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No. _____ OFFICE OF THE CLERK

In The Supreme Court of the United States

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Petitioner,

v.

UNDERWRITERS AT LLOYD'S AND COMPANIES COLLECTIVE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When arbitrators in rendering their award fail to comply with the parties' arbitration agreement, and the agreed-upon time for rendering the award has expired, may the court remand the matter to the arbitrators for a *post hoc* corrective effort, even though Section 10(b) of the Federal Arbitration Act, 9 U.S.C. § 10(b), clearly and unambiguously permits rehearing only when the time for rendering the award has not expired?

PARTIES TO THE PROCEEDING

The Petitioner is Hartford Steam Boiler Inspection and Insurance Company.

The Respondents are Underwriters at Lloyd's and Companies Collective, National Union Fire Insurance Company, International Fire Insurance Company, Aetna Casualty and Surety Company, Home Insurance Company, and Zurich Insurance Company.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Hartford Steam Boiler Inspection and Insurance Company is a wholly-owned subsidiary of the American International Group, Inc., a publicly-traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hartford Steam Boiler Inspection and Insurance Company ("HSB") respectfully prays that the Court grant a writ of certiorari to review the decision of the Supreme Court of Connecticut in *Hartford Steam Boiler Inspection and Insurance Company v. Underwriter's at Lloyd's and Companies Collective,* et al.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court in this matter, Appendix ("App.") 1-27, is reported at 271 Conn. 474 and at 857 A.2d 893. The opinion of the Connecticut Superior Court in this matter, App. 28-43, is reported at 32 Conn. L. Rptr. 659, and is available electronically at 2002 WL 31001841 and at 2002 Conn. Super. LEXIS 2634.

JURISDICTION

The Connecticut Supreme Court officially released its decision in this matter on October 12, 2004. App. 1. No party to the proceeding sought rehearing or reconsideration. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

9 U.S.C. § 10. Same [Award of arbitrators]; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the

> award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> . . . .
>
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> **(b)** If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

I. Introduction.

This case involves a recurring and unsettled question of federal arbitration law, on which the Connecticut Supreme Court and the United States Court of Appeals for the Ninth Circuit have disagreed: what is the proper remedy when an arbitration award fails to comply with requirements set forth in the parties' arbitration agreement? The Federal Arbitration Act ("FAA") plainly and unambiguously gives reviewing courts two options: they may either vacate the award, on the grounds that the arbitrators "exceeded their powers," 9 U.S.C. § 10(a)(4), or they may (in their discretion) vacate and remand the matter to the arbitrators for rehearing, in order to correct any deficiency in the award, but *only* if "the time within which the agreement required the award to be made has not expired," 9 U.S.C. § 10(b).

Some courts have faithfully applied these statutory commands, but many – including the courts below in this case – have permitted (even encouraged) a remand without regard to whether the arbitrators' appointment has expired under the parties' agreement. Such a result is flatly inconsistent with FAA's plain terms. As such, it is also flatly inconsistent with this Court's commands regarding the proper interpretation of federal statutes.

Such an *ad hoc* remedy is not merely wrong; engrafting such "common law" remedies onto a clear statutory regime effectively eliminates parties' ability to predict or define *ex ante* the circumstances under which they may resolve their disputes, in a way that is inconsistent with the Congressional policies underlying the FAA. The disarray in the courts on this issue compounds this problem, further threatening the predictable enforcement of arbitration agreements in transactions involving interstate commerce. As a result, Petitioner HSB respectfully requests that the Court grant certiorari, and resolve definitively the circumstances under which the FAA permits courts to remand matters to arbitrators for clarification or supplementation.

II. The Underlying Arbitration Proceedings.

HSB and Respondents have stipulated to the essential facts. *See* App. 39-43.

On August 11, 1993, there was a catastrophic explosion at Independence Steam Electric Station Unit Two ("ISES Unit Two"), a coal-fired power plant located near Newark, Arkansas, causing in excess of $28 million in damage. App. 40. The owners of ISES Unit Two promptly made claims for this loss under two insurance programs:

a boiler and machinery insurance policy issued by Petitioner HSB,[1] and "all-risks" property insurance coverage underwritten by Respondents.[2] App. 39-40.

After investigating the loss, both HSB and Respondents denied coverage under their respective policies. App. 40. When faced with these reciprocal denials, the insureds invoked parallel "Loss Adjustment Endorsements" found in both policies, pursuant to which the policyholders were made whole. App. 40-41.

Under the terms of the Loss Adjustment Endorsements, the coverage dispute between HSB and Respondents was then submitted to a panel of three arbitrators. App. 41. An initial arbitration hearing focused on the causes and progress of the explosion and on certain factual

[1] Boiler and machinery insurance is "insurance of a specified, particular, definite and restricted kind." *Continental Ins. Co. v. Acadia Ins. Co.*, 974 F. Supp. 371, 374 (D. Vt. 1997) (internal quotation omitted). It "gives a manufacturer or other user of a narrow range of equipment in which [the B&M insurer] specializes additional protection for accidents involving the enumerated items, which besides moving or rotating machinery consists of steam boilers and closely related, specifically enumerated types of equipment." *Stone Container Corp. v. Hartford Steam Boiler Insp. & Ins. Co.*, 165 F.3d 1157, 1161 (7th Cir. 1999) (Posner, J.).

[2] Respondents' coverage is extremely broad, protecting the insureds against "all risks of direct physical loss or damage to the insured property," unless specifically excluded. *See generally* Jane Massey Draper, Annotation, *Coverage Under "All Risks" Insurance*, 30 A.L.R.5TH 170 (1995) ("All-risks insurance . . . generally allows recovery for all fortuitous losses unless the policy contains a specific exclusion expressly excluding the loss from coverage.").

questions relating to the application of policy language to technical design aspects of ISES Unit Two. App. 41.

As a result of the panel's resolution of these questions, it was clear that part of the loss fell within the coverage of Respondents' "all risks" policies, and part of the loss fell within the coverage of HSB's boiler and machinery insurance. App. 42. The award did not make it clear, however, how repair and restoration costs were to be allocated to each policy, and in the absence of such guidance, the parties were unable to agree on such an allocation among themselves. App. 42. Accordingly, HSB and Respondents re-submitted the matter to the arbitral panel for resolution. App. 42.

In connection with this submission, the parties and arbitrators agreed upon a set of "Revised Procedures to Govern the Phase II Arbitration Re: Allocation Issues." App. 42. This contract defined the issues to be resolved in the second arbitration and established the duties of the arbitral panel. In essence, the arbitral panel was directed to allocate repair costs into five categories, and then was to "resolve all liability and allocation issues with respect to each category of costs . . . , including, without limitation, all coverage issues." App. 3. These agreed-upon procedures also provided that the panel was to render its award within thirty days after submission of the parties' post-hearing briefs. Further, and of particular relevance to this case, these procedures required that "[t]he arbitration award shall be in writing and *shall contain findings of fact and conclusions regarding the interpretation of the insurance policies* that are the subject of this arbitration as necessary to support the award." App. 4, 34 (emphasis added).

This second-phase arbitration hearing took place on June 28 and 29, 2001 in Connecticut. App. 42. The panel rendered its award on January 24, 2002. App. 43.[3]

- The panel concluded that $8,131,139.62 in costs were directly attributable to collapse.
- The panel concluded that $7,563,239.90 in costs were directly attributable to excessive pressure within the furnace enclosure.
- The panel concluded, reiterating the parties' agreement during the adjustment process, that $948,102.27 in costs were the sole responsibility of Respondents, and that $1,012.80 in costs were the sole responsibility of HSB.
- The panel concluded that a total of $11,539,066.54 in costs were general project expenses that could not be attributable specifically to collapse or overpressurization.

See App. 4 n.3.

The panel's application of these factual conclusions to the matter at hand – the apportionment of the sum in dispute (as paid by HSB and Respondents) – reads in full as follows:

> b. The allocation of $21,182,461.13 paid under the Joint Loss Agreement has been resolved in accordance with policy coverages as follows:

[3] Although the award would have been due by October 28, 2001, on October 24 – with four days remaining – this period was tolled at the panel's request, in order for the arbitrators to consult an accountant.

Boiler & Machinery -	$14,489,833.52
All Risk -	$7,375,012.59
Total -	$21,864,846.11

App 4.

The award did not contain any explanation as to how the arbitrators reached this conclusion, and had no explanation of how its interpretation of the language of the relevant policies led to this result. In consequence, HSB was denied the process it bargained for: an arbitration award that was the result of, and reflected, a disciplined and analytical adjudication, and that expressly took account of the relevant facts and the language of the two insurance policies at issue.

III. Proceedings Below.

Accordingly, HSB filed a petition with the Connecticut Superior Court, seeking *vacatur* of the January 24, 2002 award. App. 28, 31. Respondents asked the court to deny HSB's motion and cross-moved to confirm the award. As an alternative, Respondents requested a remand to the arbitrators for clarification. App. 28, 31. In both instances, Respondents urged the Court to apply not the Connecticut Arbitration Act, CONN. GEN. STAT. § 52-418, but the essentially-identical terms of the FAA, 9 U.S.C. § 10. The Superior Court held that both the Connecticut and Federal Arbitration Acts applied, App. 33, and concluded that under either statute the arbitrators had exceeded their authority by failing to comply with the requirements of the submission:

> Although the Panel in its Decision of Arbitrators dated January 24, 2002 recited the scope of the arbitration . . . , there is no explanation or

> resolution of coverage issues. Further, there are no facts that support the figures in paragraphs a and b on the last page of the Decision of Arbitrators. There are no supporting facts or allocation of liability or the reasons for the numbers that have been awarded as well as to which party liability should attach for each of these figures. Further in paragraph b there are neither supporting facts to adequately interpret the numbers assigned to Boiler & Machinery nor the numbers assigned to All Risk. The findings are not sufficiently specific or comprehensive to comply with the requirement that all liability and allocation issues and all coverage issues be resolved, nor do the findings contain sufficient findings of fact and conclusions regarding the interpretation of the insurance polices that are the subject of this arbitration as necessary to support the award.

App. 36-37. The court relied principally on *Western Employers Insurance Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992), which held that arbitrators exceed their authority where they fail to provide findings of fact and conclusions of law as required by the terms of the submission. App. 34.[4]

Even though the Superior Court agreed with HSB about the sufficiency of the award, the Court declined to vacate the award, as HSB requested, and as had been done in the *Western Employers* case. Instead, the court remanded the matter to the arbitral panel, nominally

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[4] The Superior Court also rejected Respondents' contention that HSB had, through statements of counsel at the arbitration hearing, waived its right to findings of fact and conclusions of law. App. 32.

pursuant to Section 52-418(b) of the Connecticut General Statutes, which provides that "If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators." App. 37-39. The court did so even though it found that "the time within which the award is required to be rendered" had already expired, declining to enforce that statutory limitation. App. 37-38.

HSB appealed this determination, believing that a *post hoc* "backfill" of findings and reasoning to justify a predetermined conclusion was not what it bargained for. In its appeal, HSB contended that both the plain language of the Connecticut Arbitration Act and the FAA's identical provisions permitted remand only where the time to render an award had not passed. The Connecticut Supreme Court, exercising its statutory authority, transferred the appeal from the Court of Appeals to itself. App. 5. Respondents moved to dismiss the appeal, contending that appeals could lie only from orders "vacating" the award; they characterized the opinion below – even though it applied a statutory provision nominally requiring *vacatur* before remand – as a "simple remand" to the arbitrators for clarification, rather than a *vacatur* and remand.[5] Consideration of the jurisdictional issue was postponed for resolution together with the merits of the appeal.

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[5] Respondents also cross-appealed, challenging the Superior Court's finding that HSB had not waived its right to findings and conclusions.

The Connecticut Supreme Court agreed with Respondents. First, the court held that the FAA, and not the Connecticut Arbitration Act, governed the proceedings. App. 10-11. The court then ruled that "federal precedent . . . informs us that a court may remand without vacating a case to an arbitrator for clarification of a final award, pursuant to the [Federal Arbitration Act]." App. 12-13.[6]

"Having determined that the trial court had the authority to remand the case to the arbitration panel," the court considered whether HSB "may appeal the remand order at this time." App. 23. The court concluded that HSB could not, because "the trial court did not vacate the award, or otherwise confirm, modify or correct it." App. 24 (paraphrasing CONN. GEN. STAT. § 52-423). The court also held that Connecticut's analogue to the "collateral order" doctrine did not permit interlocutory review of the Superior Court's order. App. 24-26 (relying on *State v. Curcio,* 191 Conn. 27, 31, 463 A.2d 566, 569-70 (1983), and its progeny). Accordingly – despite having ruled on the merits of the very question presented by HSB's appeal, App. 5, 11-23, and despite agreeing with HSB and the Superior Court that the award did not conform to the parties' arbitration agreement, App. 27 – the Connecticut Supreme Court

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[6] In essence, the Court reached out to decide the issue as a matter of federal law, in order to avoid overruling two of its own precedents. Had the Court applied the Connecticut Arbitration Act, it would have been required to confront those decisions, both of which held – consistent with the statutory language – that courts could not remand matters to arbitrators where the time to render the award had expired. *See Chmielewski v. Aetna Cas. & Sur. Co.,* 218 Conn. 646, 680, 591 A.2d 101, 118 (1991); *Aetna Life & Cas. Co. v. Bulaong,* 218 Conn. 51, 64 & n.11, 588 A.2d 138, 145 & n.11 (1991). Because of these precedents, there is no alternative state law ground that can support the holding here.

dismissed the appeal. App. 1, 27. HSB seeks review of this decision.[7]

REASONS FOR GRANTING THE WRIT

As noted, the Connecticut Supreme Court's decision is flatly inconsistent with the unambiguous language of the Federal Arbitration Act, which expressly permits a remand to the arbitrators *only* where the award has first been vacated, and *only* when "the time within which the agreement required the award to be made has not expired," 9

[7] Although further proceedings are contemplated, this matter nonetheless is final and ripe for review by this Court. First, as a practical matter, "the federal issue, finally decided by the highest court in the State," inevitably "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). This is because the Connecticut Supreme Court has precluded the arbitrators from altering the ultimate result of the arbitration, App. 13-14, leaving HSB aggrieved regardless of the outcome. Even if HSB is able, following the arbitrator's supplemental findings, to obtain *vacatur* of the award on some ground not presently revealed in the record – a possibility that candidly appears far-fetched at present – this issue would remain as an alternative ground justifying *vacatur* of the award in Respondents' inevitable appeal.

Second, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83 (1975); *accord Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984). Here, as in *Cox*, the Connecticut Supreme Court's judgment "is plainly final on the federal issue and is not subject to further review in the state courts," 420 U.S. at 485, and, if the Court rules in HSB's favor on the issue presented in this petition, "this litigation ends," *id.* at 486. Further, the Court has previously held that the Federal Arbitration Act and its underlying policies effectuate a compelling federal policy and therefore justify immediate appellate review. *See Southland*, 465 U.S. at 7-8.

U.S.C. § 10(b). The decision below – relying on misguided decisions from other courts – effectively added a third extra-statutory option, permitting remand without regard to Section 10(b)'s limitations. Whatever merit this might conceivably have as a matter of policy, it is impossible to reconcile with the commands this Court has given regarding the construction of federal statutes.

Compounding this error is the fact that it in turn manifests and aggravates an existing disarray in applicable case law. In particular, the decision below is impossible to square with a conflicting decision, on almost-identical facts, from the United States Court of Appeals for the Ninth Circuit. This confusion is not only troubling as an abstract matter: more practically, it effectively eliminates parties' ability to predict or define *ex ante* the circumstances under which they may resolve their disputes, in a way that is inconsistent with the Congressional policies underlying the FAA.

Accordingly, this Court's review is needed to give effect to the plain language of the FAA, and to vindicate the Act's basic policy, which is "at bottom . . . the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

I. The Decision Below, by Ignoring the Plain Language of the Federal Arbitration Act, Refuses to Follow This Court's Commands Concerning the Interpretation of Federal Statutes.

This Court often has observed that the FAA's essential purpose is to promote freedom of contract by guaranteeing that contracts are enforced according to their terms.

See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("The FAA . . . ensures the enforceability of private agreements to arbitrate. . . . "); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 476 (1989) ("the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"); *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered. . . . ").

As a necessary corollary to this fundamental Congressional purpose, this Court has long made it clear that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *See Volt*, 489 U.S. at 479. Accordingly, the parties "may limit by contract the issues they will arbitrate," *Volt*, 489 U.S. at 479, "may specify by contract the rules under which that arbitration will be conducted," *id.*, and "cannot be required to submit to arbitration any dispute which [they have] not agreed so to submit," *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

Accordingly, although the grounds for avoiding an unfavorable arbitration result are few and narrow, and courts will set aside arbitration awards "only in very unusual circumstances," *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), the FAA requires courts to invalidate arbitration awards where, *inter alia*, "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award

upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).[8]

One such circumstance, courts and commentators agree, is when the arbitrators' award fails to conform to the requirements set out in the parties' arbitration agreement. *See, e.g., Western Employers Ins. Company v. Jefferies & Co.,* 958 F.2d 258, 262 (9th Cir. 1992) (where arbitrators "failed to arbitrate the dispute according to the terms of the arbitration agreement, they "exceeded their authority under" 9 U.S.C. § 10(a)(4), because "arbitrators can . . . 'exceed their powers' . . . when they fail to meet *their* obligations, as specified in a given contract, to the parties"); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards,* 30 GA. L. REV. 731, 753-54 (1996) ("If an arbitrator fails to comply with an express requirement set forth in the arbitration agreement as to the form, nature or content of the arbitration award, the award will be vacated."). Indeed, if the courts were to enforce arbitration awards that are inconsistent with the parties' agreement to arbitrate, it would be – in this Court's apt words in an analogous context – "quite inimical to the FAA's primary purpose of ensuring that agreements to arbitrate are enforced according to their terms." *Volt,* 489 U.S. at 479.

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[8] This is the only express ground for *vacatur* of an award that relates to the substance of the arbitration award itself. The remaining grounds for *vacatur* are directed to the integrity of the arbitral process itself, requiring remand, for example, "where the award was procured by corruption, fraud, or undue means," 9 U.S.C. § 10(a)(1); or "where there was evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2); or "where the arbitrators were guilty of misconduct" in conducting the arbitration hearing, 9 U.S.C. § 10(a)(3).

When there is such a defective award, the FAA by its terms offers the reviewing court only two options. First, the court may vacate the award. 9 U.S.C. § 10(a). Second, the court "in its discretion," may "direct a rehearing by the arbitrators," but *only* if it vacates the award *and* "the time within which the agreement required the award to be made has not expired." 9 U.S.C. § 10(b).

To this exclusive list of options, the Connecticut Supreme Court – adopting the suggestion of other courts – added a third: it affirmed an order remanding the award, without vacating it, and without regard to any temporal limitation upon the arbitrators' ability to act (as set forth in the arbitration agreement). App. 11-23. It did so by looking to Court of Appeals cases – principally from the Third and Sixth Circuits – which have held that remand is appropriate to clarify an ambiguous award. App. 11-23 (citing, *inter alia, Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24,* 357 F.3d 546 (6th Cir. 2004); *M&C Corp. v. Erwin Behr GMBH & Co.,* 326 F.3d 772 (6th Cir. 2003); *Green v. Ameritech Corp.,* 200 F.3d 967 (6th Cir. 2000); *Office & Prof'l Employees Int'l Union, Local 471 v. Brownsville Gen. Hosp.,* 186 F.3d 326, 331 (3d Cir. 1999); *International Bhd. of Teamsters, Local 631 v. Silver State Disposal Service, Inc.,* 109 F.3d 1409 (9th Cir. 1997); *Colonial Penn Ins. Co. v. Omaha Indem. Co.,* 943 F.2d 327 (3d Cir. 1991); *La Vale Plaza, Inc. v. R.S. Noonan, Inc.,* 378 F.2d 569 (3d Cir. 1967)).

The court did so even though it recognized that "there is no explicit provision in the [FAA] for such a remand," App. 13 (quoting *Colonial Penn v. Omaha Indemnity,* 943 F.2d at 333-34). Further, the court expressly disregarded the temporal limitations in 9 U.S.C. § 10(b): because "the trial court remanded but did not vacate the award," the

court reasoned, "any time limitation contained in § 10(b)" was rendered "inapplicable." App. 21 n.16. Even so, the court approved such a "common law" remedy without hesitation, purportedly because it "is consistent with, and furthers, the federal and state policies favoring arbitration as a means for expedient resolution of disputes," and (posited the court) will give the parties "an arbitration award in accordance with the terms agreed to in their governing procedures." App. 21-23.[9]

By effectively rewriting the FAA in such a fashion, to insert an additional remedy for defective awards that bears none of the constraints otherwise imposed by the FAA's express terms, the Connecticut courts (as well as other courts sanctioning remand outside the strictures of 9 U.S.C. § 10(b)) have fundamentally violated this Court's directions for the proper construction of federal statutes. After all, as this Court has said time and again, when a statute's language is plain – as it is in the case of 9 U.S.C. § 10(b) – the "'sole function of the . . . courts is to enforce it according to its terms.'" *Lamie v. United States Trustee,* 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6 (2000), in turn quoting *United States v. Ron Pair Enterprises,* 489 U.S. 235, 241 (1989), in turn quoting *Caminetti v. United States,* 242 U.S. 470, 485 (1917)). In that case, "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'"

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[9] HSB disagrees: as noted above, *see supra* at 5, 7, it bargained for a principled arbitration award that was derived from and *accompanied by* findings and conclusions, not merely a set of *post hoc* justifications intended to support a predetermined conclusion. That is more appropriately a matter for consideration on the merits, however.

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). A court may not "add features" to a statutory scheme simply because it believes that those features "will achieve the statutory 'purposes' more effectively." *See Director, Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Nor may a court "disregard requirements simply because it considers them redundant or unsuited to achieving the [statute's] general purpose in a particular case." *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968).

Furthermore, if courts may freely remand arbitration awards that are incomplete, ambiguous, or otherwise facially defective, without *vacatur* as a condition precedent and without regard to whether an arbitrator's tenure has otherwise expired, that "common law" arbitration rule will swallow the more-restrictive provisions of 9 U.S.C. § 10(b). Why would courts rely on Section 10(b), with its limitations, when instead they can simply remand awards for clarification? As a result, the decision below contradicts another of this Court's directions on statutory construction, most recently reiterated just three weeks ago: the admonition that courts must, wherever possible, construe statutes to "give every word some operative effect," and that courts conversely should not read a statute in a manner that would render part of it "entirely superfluous." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, ___ U.S. ___, 125 S. Ct. 577, 583-84 (2004).

The implication of "common law" remedies is particularly inadvisable where, as here, there is a comprehensive statutory scheme, with an existing menu of remedial options for defective arbitration awards. "'[I]t is an elemental canon of statutory construction that where a statute

expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 14-15 (1981) (quoting *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 19 (1979)). In such situations, this Court advises that we are "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

Simply put, it was not the Connecticut Supreme Court's job to rewrite a federal statute simply because it believed that an additional remedy may be useful or generally consistent with the law's overall thrust. Such an effort contravenes this Court's commands, and merits this Court's intervention.

II. The Decision Below Conflicts with a Decision of the United States Court of Appeals for the Ninth Circuit, and Reflects a General Disarray in the Decisions of the Federal Courts of Appeals and Federal District Courts Law.

Such an *ad hoc* remedy, though troubling, might perhaps be tolerable if courts were uniform in applying it. That is not the case, however: the Connecticut Supreme Court's decision is squarely inconsistent with the Ninth Circuit's decision in *Western Employers Insurance Co. v. Jefferies & Co.,* 958 F.2d 258 (9th Cir. 1992), a case that is for all practical purposes indistinguishable.

In that case, involving an arbitration dispute arising out of a securities trading agreement, the parties' arbitration agreement required that the award be accompanied by "findings of fact and conclusions of law." 958 F.2d at 259. When the award was rendered without such findings

or conclusions, Western Employers filed a motion to vacate the award. Although the district court denied the motion, the Ninth Circuit disagreed, and directed the district court to vacate the award:

> We . . . believe that the circumstances underlying the dispute between Western and Jefferies implicate traditional principles of contract law, which are recognized in the Federal Arbitration Act. Under these traditional principles, Western had a right to receive what it bargained for – arbitration according to the terms of its contract with Jefferies. By failing to abide by the contract from which NASD derived its power to hear the dispute, the arbitrators exceeded their powers under [9 U.S.C. § 10(a)(4)] of the Act.

Id. at 260.

This case is no different: the arbitration agreement here required "findings of fact and conclusions regarding the interpretation of the insurance policies" at issue, App. 4, 34, and no such findings or conclusions are present, as the Connecticut Superior Court and Supreme Court both held, App. 27, 36-37.

Although the court below attempted to distinguish *Western Employers*, its efforts are unpersuasive. It grounded its refusal to follow *Western Employers* upon the fact that there was evidence in that case that the arbitrators had affirmatively refused to provide findings. App. 20-21 n.15. Here, by contrast, there is nothing in the record to shed light on whether the arbitrators' failure was a deliberate refusal to abide by the arbitration agreement or was instead simply a negligent oversight. That is, however, a distinction without a difference: nothing in the text of the FAA conditions the remedy for a defective award on

whether the defect was the result of intentional misconduct or inadvertent mistake. In either case, the parties did not receive the benefit of their bargain, and in either case the FAA's express terms provide that the appropriate remedy is *vacatur*, followed in appropriate cases by rehearing if (and only if) the arbitrator's time to render an award has not expired.

In reaching its decision, the Connecticut Supreme Court created directly a conflict that had previously arisen in principle in 2000, when the Sixth Circuit decided *Green v. Ameritech*. In that case, the arbitration agreement required that the award "explain" the arbitrator's decision. 200 F.3d at 970. One of the litigants sought *vacatur* of the award on the ground that it did not conform to this requirement. The court held as an initial matter that the award did "explain" the arbitrator's decision (albeit not as completely as the appellant had hoped), and distinguished *Western Employers* on that ground. *Id.* at 974-76. In *dictum*, however, the court suggested that the proper remedy for a defective award would not have been *vacatur*, but rather would have been a remand for "clarification." *Id.* at 976-78. The court reached that ruling without citing Section 10(b). The court's oversight in that respect was essential to its reasoning, since the 21-day time limit within which the award was to have been rendered, *see id.* at 970 (quoting the arbitration agreement), had long expired.

More broadly, the law remains in considerable disarray on this point. Some cases – too few, in light of the statute's clarity – are faithful to the dictates of Section 10(b), either applying it in the course of directing remand or declining to remand because the time for rendering the award has lapsed. *See, e.g., Galt v. Libbey-Owens-Ford*

Glass Co., 397 F.2d 439, 442 (7th Cir. 1968); *Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861, 896 (N.D. Iowa 1999), *rev'd on other grounds*, 236 F.3d 458 (8th Cir. 2001). Most courts fail to cite Section 10(b) at all in the course of discussing remands to arbitrators. *See, e.g., Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24*, 357 F.3d 546 (6th Cir. 2004); *M&C Corp. v. Erwin Behr GMBH & Co.*, 326 F.3d 772 (6th Cir. 2003); *Office & Prof'l Employees Int'l Union, Local 471 v. Brownsville Gen. Hosp.*, 186 F.3d 326, 331 (3d Cir. 1999); *International Bhd. of Teamsters, Local 631 v. Silver State Disposal Service, Inc.*, 109 F.3d 1409 (9th Cir. 1997).[10] In those instances, any compliance with Section 10(b)'s temporal limitation is purely accidental. One decision, *Colonial Penn Insurance Co. v. Omaha Indemnity Co.*, 943 F.2d 327 (3d Cir. 1991), went so far as to cite and discuss Section 10(b) – "we note that the Act itself provides for a remand to the arbitrators for purposes of rehearing in certain circumstances," *id.* at 334 – yet inexplicably failed to apply it to the matter at bar.

As a result, there now are at least two divergent lines of precedent as to the proper result when an arbitration award fails to comply with the parties' agreement. Some courts will remand for "clarification," on an *ad hoc* basis, without regard for the provisions of 9 U.S.C. § 10(b), while others are more faithful to the statutory text (whether deliberately or accidentally) and will vacate the award on

[10] Many of these rely on (or cite cases that in turn rely on) the Third Circuit's decision in *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967). That case, however, never had occasion to consider the FAA at all; instead, it was ruling on the availability of a remand for clarification as a matter of Pennsylvania common law (which, the court determined, governed the arbitration at issue there).

the grounds that the arbitrators exceeded their powers. In order to resolve this direct conflict, and to ensure that the FAA's language is given full effect by courts reviewing arbitration awards, this Court's assistance is needed.

III. Judicial Displacement of the FAA's Express Provisions with Implied Common Law Remedies Undermines Predictability and Threatens the Utility of Commercial Arbitration.

More broadly, this disarray in the law, as exemplified by the decision below, threatens to undermine one of the great values of arbitration – the predictability of non-judicial dispute resolution mechanisms – and is inconsistent with the federal policies underlying the FAA.

It is, after all, an elementary principle underlying the law of contracts that private agreements should be enforced according to their terms.[11] It is an equally elementary principle of law that the parties' contract terms are deemed to incorporate existing principles of law: "it is presumed that parties contract with knowledge of, or in reliance on, existing law; accordingly it is presumed that the parties had such law in contemplation when the contract was made." 17A C.J.S. *Contracts* § 348 (1999); *accord* 11 Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 30.19, at 351-52 (4th ed. 1999); 17A AM. JUR. 2D *Contracts* § 371 (2004). These rules provide a predictability that is necessary for stable commercial relations: parties can be confident that their contractual rights will be enforced and can, when existing

[11] As noted, *see supra* at 12-14, this is itself the core principle underlying the FAA.

"off the shelf" principles of law are inconsistent with their intention, negotiate around them (so long as their bargain does not offend other principles of public policy). *See generally, e.g.,* 2 E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 7.16, at 351-52 (3d ed. 2004); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Analysis of Default Rules,* 99 YALE L.J. 87 (1989). Accordingly, the law necessarily discourages courts from implying additional contract terms or remedies, beyond those provided by the parties themselves or by well-defined principles of law.

These principles apply with equal vigor to arbitration, a matter that is, as the Court has noted, "simply a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 (1995); *accord United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). If parties entering into an agreement providing for arbitration cannot determine, before a dispute arises, the manner in which the arbitration will proceed and the circumstances under which an award will stand or fall – whether provided by the FAA, or other potentially-applicable statute,[12] or by the agreement itself – it may discourage the parties from resorting to arbitration. After all, one of the primary purposes of arbitration is to resolve disputes before capable arbitrators

[12] As an aside, under the Connecticut Supreme Court's reasoning, it is difficult to envision a circumstance under which a state arbitration act could continue to apply to a dispute. The Connecticut Arbitration Act as placed in issue here in no way can be said to be inconsistent with the FAA (the operative provisions relevant here are essentially identical, *compare* 9 U.S.C. § 10 *with* CONN. GEN. STAT. § 52-418), yet the Connecticut court disregarded completely its own state statute (and its own precedents construing that statute).

in a manner that is more efficient and predictable than the vagaries of litigation before lay juries.

The existing confusion in the law aggravates this concern. If extra-statutory remedies are applied inconsistently, the parties not only cannot rely on the unambiguous language of the relevant statute, but also lack even the ability to forecast the course of their arbitration using clearly-defined principles of common law.

Admittedly, the creation of such *ad hoc* remedies is tempting, in order to clear judicial dockets and further the "federal policy favoring arbitration," *Volt,* 489 U.S. at 476. The court below explicitly succumbed to this temptation, believing that it would "further[] ... policies favoring arbitration as a means for expedient resolution of disputes." App. 21-22.

Nevertheless, as this Court has often counseled, courts must not allow themselves to be seduced by such considerations. "[W]e must not ... allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation," *i.e.,* the "desire to enforce agreements into which parties had entered." *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 220 (1985). *See also EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002) ("we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated"); *id.* at 293 n.9 (noting that the Court's precedents "direct courts to respect the terms of the agreement without regard to the federal policy favoring arbitration"). Put otherwise, "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.,*

514 U.S. 52, 57 (1995). Or, more bluntly, the FAA was designed "to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

As a result, this Court's precedents direct lower courts to abide by the parties' agreement, even when it seems to the court to be inconsistent with its conception of the best way to proceed.[13] As this Court has observed, "we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House*, 534 U.S. at 293. Or, stated otherwise, "the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *First Options v. Kaplan*, 514 U.S. at 947 (citations and internal quotation omitted).

A clear understanding that remands to arbitrators are governed exclusively by Section 10(b) of the FAA, 9 U.S.C. § 10(b), with its limitations, will better enable parties to effectuate their contractual intentions in entering into arbitration. That is because it will permit the parties to define for themselves the circumstances under which arbitrators will be permitted to revisit its award (by accepting the default statutory rule, or by expressly

[13] *Cf. Volt*, 489 U.S. at 479 (holding that enforcement of the rules agreed upon by the parties, "is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward").

providing such a right). (In the alternative, should Congress determine as a matter of policy that Section 10(b) is too restrictive, it may amend the law.)

In sum, the existing disorder in the law – by causing uncertainty as to whether or how facially-defective arbitration awards can be remanded back to arbitrators for "clarification" – threatens the predictable enforcement of private arbitration contracts, in violation of the core policies undergirding the FAA. Therefore, this Court should step in and clarify that Section 10(b), 9 U.S.C. § 10(b), means what it says, and permits remand only if an award is first vacated, and only if the time in which the arbitrators are to act has not expired.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Supreme Court of Connecticut.

Respectfully submitted,

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857 A.2d 893

Supreme Court of Connecticut.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY

v.

UNDERWRITERS AT LLOYD'S AND COMPANIES COLLECTIVE et al.

No. 17024.

Argued March 22, 2004.
Decided Oct. 12, 2004.

Thomas E. Birsic, pro hac vice, with whom were Paul K. Stockman, pro hac vice, and Maurice T. Fitz-Maurice, Hartford, for the appellant-appellee (plaintiff).

Linda L. Morkan, with whom were Clayton H. Farnham, pro hac vice, and, on the brief, Patrick J. Sweeney, Hartford, for the appellees-appellants (defendants).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

ZARELLA, J.

The determinative issue in this appeal is whether the judgment of the trial court directing a rehearing by the arbitration panel to clarify the award constitutes a final judgment or an otherwise appealable interlocutory order, thereby implicating our subject matter jurisdiction. We determine that the trial court's remand order does not constitute a final judgment or an appealable interlocutory order and, therefore, that we lack subject matter jurisdiction to review the merits of the claims of the plaintiff, Hartford Steam Boiler Inspection and Insurance Company (Hartford Steam Boiler), on its appeal and of the defendants,

Underwriters at Lloyd's and Companies Collective et al.[1] (underwriters), in their cross appeal.

The following facts are relevant to this case. On August 11, 1993, a catastrophic explosion at an electrical generating facility near Newark, Arkansas, caused more than $28 million in damage. The owners of the facility, Arkansas Power and Light Company and others (collectively referred to as the insureds), submitted claims to two insurance providers, Hartford Steam Boiler, which provided boiler and machinery insurance, and the underwriters, which provided "all risks" property insurance. After investigating the losses, however, both providers denied coverage for the claims, determining that their respective policies did not cover such losses.

Thereafter, the insureds invoked the "Loss Adjustment Endorsements" provisions contained in both policies. These provisions enabled the insureds to recover the total losses caused by the explosion by collecting one half of the amount in dispute from each insurance company. As a result, Hartford Steam Boiler paid $10,933,435.86 to the insureds and the underwriters paid $11,880,525.33. The loss adjustment endorsements also contained a provision enabling Hartford Steam Boiler and the underwriters, after payment to the insureds, to submit any dispute as to respective liability to arbitration, which they did.

The initial arbitration, referred to by the parties as phase I, commenced in Memphis, Tennessee, in 1996, and

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[1] In addition to Underwriters at Lloyd's and Companies Collective, the defendants include National Union Fire Insurance Company, International Fire Insurance Company, Aetna Casualty and Surety Company, Home Insurance Company and Zurich Insurance Company.

was governed by procedures agreed to by Hartford Steam Boiler and the underwriters. On January 9, 1997, the arbitration panel issued an interim award and, thereafter, it issued a supplemental clarified decision in response to the parties' questions as to the meaning of the initial award. As a result of these decisions, Hartford Steam Boiler and the underwriters agreed that each of their policies covered a portion of the losses but they did not agree as to the apportionment of their respective liability.

Because of this disagreement as to the allocation of the losses, Hartford Steam Boiler and the underwriters resubmitted the matter to the arbitration panel, thereby commencing phase II of the arbitration. The parties stipulated to a statement of issues, which was limited to a determination of: "1. which costs are directly attributable to the collapse of the coutant support structure (i.e., the 'bottom' costs); 2. which costs are directly attributable to explosion and/or overpressurization associated with Unit Two (i.e., the 'top' costs); 3. which costs are directly attributable to fire, firefighting, or the explosion in D Mill; 4. which costs are common or general project costs that are not allocable into categories (a), (b) or (c); and 5. any costs whose purpose or allocation cannot be determined from available evidence, or that do not otherwise fall within categories (a), (b) or (c)." The statement of issues also called upon the panel to "resolve all liability and allocation issues with respect to each category of costs identified in Paragraph 1, including, without limitation, all coverage issues."[2] Hartford Steam Boiler and the underwriters also agreed to a revised set of general procedures that would

[2] The statement of issues also set forth a procedural time line for the arbitration.

govern phase II of the arbitration. Among these procedures, the parties agreed that "[t]he arbitration award shall be in writing and shall contain findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award."

After a hearing on the allocation issue in Windsor Locks, Connecticut, on June 28 and 29, 2001, the arbitration panel issued a decision on January 24, 2002, in which it responded to each question set forth in the parties' joint statement of issues. With respect to the first five issues, the panel presented dollar amounts reflecting the allocation of costs corresponding to each question.[3] The panel also determined that "[t]he allocation of $21,182,561.13 paid under the Joint Loss Agreement has been resolved in accordance with policy coverages as follows: Boiler & Machinery – $14,489,833.52; All Risk – $7,375,012.59; Total $21,864,846.11."

Subsequently, on February 22, 2002, Hartford Steam Boiler moved to vacate the award, and the underwriters moved to confirm the award or, alternatively, to remand the case to the panel for clarification. After a hearing on May 22, 2002, the trial court found in favor of the underwriters and

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[3] The panel determined the costs as follows:

"[1.]	$	8,131,139.62	
"[2.]	$	7,563,239.90	
"[3.]	$	948,102.27	Agreed property loss for [the underwriters] (D Mill $95,829.14 not included)
	$	1,012.80	Agreed Boiler loss
"[4.]	$	11,539,066.54	
"[5.]		None	
"	$	28,182,561.13	Total without D Mill"

remanded the case to the arbitration panel for a rehearing to clarify the award, so that the arbitrators' decision would include findings of fact and interpretations of the policies, as required by the governing procedures.

Hartford Steam Boiler appealed from the judgment of the trial court and the underwriters cross appealed.[4] We transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1. We will set forth additional facts as necessary.

Hartford Steam Boiler claims that the trial court improperly remanded the award to the panel after the expiration of the applicable time period set forth in General Statutes § 52-418(b),[5] and relies on our holdings in *Aetna Life & Casualty Co. v. Bulaong,* 218 Conn. 51, 588 A.2d 138 (1991), and *Chmielewski v. Aetna Casualty & Surety Co.,* 218 Conn. 646, 591 A.2d 101 (1991), to support this proposition. In addition, Hartford Steam Boiler claims that we have subject matter jurisdiction to review the

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[4] In its cross appeal, the underwriters seek confirmation of the arbitrators' award, claiming that the trial court improperly determined that Hartford Steam Boiler did not waive its right to contest the sufficiency of the arbitrators' award. Specifically, the underwriters contend that Hartford Steam Boiler's statement at the arbitration hearing that it sought a decision reflecting merely "a statement that someone pays someone and how much they pay," constituted a waiver of Hartford Steam Boiler's right to challenge the award on any basis other than the dollar amount allocated to each party.

[5] General Statutes § 52-418(b) provides: "If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators. Notwithstanding the time within which the award is required to be rendered, if an award issued pursuant to a grievance taken under a collective bargaining agreement is vacated the court or judge shall direct a rehearing unless either party affirmatively pleads and the court or judge determines that there is no issue in dispute."

merits of this case pursuant to General Statutes § 52-423[6] because the trial court, in relying on § 52-418(b), "necessarily vacated the underlying award, in the course of directing a rehearing before the arbitrators." Hartford Steam Boiler further argues that we have jurisdiction over this matter under our holding in *State v. Curcio,* 191 Conn. 27, 30-31, 463 A.2d 566 (1983), and that its claim is appealable because "if the Superior Court's order remanding the case is read not to embody an implicit vacatur, then it is clear that the court exceeded its statutory authority under [§] 52-418(b)'s express terms (which of course require vacatur as a condition precedent to remand)." Hartford Steam Boiler also contends that § 52-418(b) represents the sole means by which a court may remand an arbitration award for a rehearing.

The underwriters claim that the trial court's order remanding the award to the arbitration panel for rehearing does not constitute an appealable final judgment or interlocutory order, and, therefore, that we lack jurisdiction to entertain Hartford Steam Boiler's appeal. Specifically, the underwriters urge that: "(1) the appeal is not authorized by [§] 52-423 which covers appeals from arbitration decisions; and (2) the Superior Court order from which [Hartford Steam Boiler] seeks relief has only returned the case to the arbitrators for additional information, and therefore is not yet appealable." They maintain that the language of § 52-423 does not include remands for rehearings within the class of appealable judgments, and

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[6] General Statutes § 52-423 provides: "An appeal may be taken from an order confirming, vacating, modifying or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."

that the remand does not qualify as an appealable interlocutory order pursuant to *State v. Curcio,* supra, 191 Conn. 27, 463 A.2d 566. We agree with the underwriters.

In order to determine whether we have jurisdiction to review the merits of this appeal, we first must ascertain whether the trial court rendered a final judgment or an otherwise appealable interlocutory order, or whether the court issued a nonappealable remand order. Thus, we must decide initially whether, in its memorandum of decision, the court intended to vacate the award and direct a rehearing pursuant to § 52-418(b) or whether it intended to remand the arbitrators' award to the panel for clarification.

In its memorandum of decision, the trial court determined, and the parties do not dispute, that both the Federal Arbitration Act (arbitration act), 9 U.S.C. § 1 et seq., and § 52-418, applied, noting that "[t]he language is essentially the same, and the criteria applied to the application to vacate is the same [and provides that an award may be vacated] . . . 'if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.'" The court determined that the arbitrators' award failed to conform with the submission of the parties because the arbitrators did not specify the factual basis for the award.[7] The court stated: "There are no supporting facts or allocation of liability or the reasons for the numbers that have been awarded as well as to which party liability should attach for each of these

[7] The trial court also determined that Hartford Steam Boiler had not waived its right to assert its claims.

figures. . . . The findings are not sufficiently specific or comprehensive to comply with the requirement that all liability and allocation issues and all coverage issues be resolved, nor do the findings contain sufficient findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award." The trial court also concluded that "these submissions were not unrestricted submissions because the arbitrators were required to follow [certain] aforementioned requirements."

Cognizant of the lengthy history of the arbitration proceedings between the parties, the trial court stated that it was "reluctant to vacate the award because that would mean starting over again, and the parties would lose all the work, effort, etc. that covered six years of this arbitration. In the interest of economy of the parties, the panel and judicial economy, it would appear that a remand to the arbitrators would be more practical and a better remedy than vacating the awards."

The court recognized that it "must have authority to [remand]," and, citing to § 52-418(b), stated that "[t]he pertinent part of the applicable statute is: 'If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators.'" The court then determined that "the award was rendered within the thirty day time limit." In addressing Hartford Steam Boiler's claim that "the time for making the award [had] expired because if the court [directed] a rehearing or a remand to the arbitrators it would be doing so beyond the January 24, 2002 deadline," the court determined that "it would be impossible for the court to direct a rehearing by the arbitrators before the time for the award has expired.

If the award were made on the [twenty-eighth] day from submission of briefs, then the court would have only two days in which to make a decision for a remand assuming that the application to vacate could be filed and presented to a judge within the thirty day time limit. The law does not contemplate permitting something that is impossible to perform. . . . Accordingly, the court finds that the time limit for making the award was fulfilled, but the time limit for the court to act was and is an impossibility, and therefore, not applicable." The court then "remand[ed the case] to the arbitration panel for a rehearing by the panel and/or for a clarification of its awards so that it [would comply] with the requirements of the submissions and so that there [would] be a sufficient finding of facts and interpretations of the policies so as to fully comply with the submissions."[8]

Although the trial court cited to § 52-418(b), which requires a vacatur as a condition precedent for a rehearing within the necessary time period, we believe that the trial court's memorandum of decision makes clear that the court intended only to remand the award to the panel for clarification, and did not intend to vacate the award. We need not discuss the legal basis for the remand because we conclude that the court had the legal authority to remand

[8] The court also ordered the parties "for the benefit of the panel, to submit written interrogatories to the panel so that if answered, the parties will be satisfied that there are sufficient findings of fact and interpretations of the policies. The parties are further ordered to submit to the panel, for its benefit, proposed findings of facts and interpretations of policies. . . . Upon the rehearing and submission of the interrogatories and proposed findings, the panel is ordered to clarify its decisions as stated above. . . ."

without vacating the arbitration decision under the arbitration act.

The United States Supreme Court expressly has held that Congress "intended [the arbitration act] to apply in state and federal courts," pursuant to the exercise of its commerce clause powers. *Southland Corp. v. Keating,* 465 U.S. 1, 15, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); accord *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 271-72, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); *Hottle v. BDO Seidman, LLP,* 268 Conn. 694, 702, 846 A.2d 862 (2004) (discussing applicability of arbitration act to states as set forth in United States Supreme Court precedent). Thus, where parties have entered into "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction"; 9 U.S.C. § 2; the arbitration act applies. See *Southland Corp. v. Keating,* supra, at 14, 104 S.Ct. 852; *Hottle v. BDO Seidman, LLP,* supra, at 702, 846 A.2d 862.

In its memorandum of decision, the trial court expressly determined that the arbitration act applies to the present matter. Hartford Steam Boiler effectively has conceded that the arbitration act applies in this case by noting in its reply brief that "[t]he provision in the [arbitration act] authorizing a remand; 9 U.S.C. § 10(b); is virtually identical to [§] 52-418(b)." Thus, Hartford Steam Boiler does not challenge the trial court's finding that the arbitration act applies, but argues instead that "both under Connecticut *and federal law,* a court reviewing an arbitration award may only remand a matter to the arbitrators when the time for rendering the award . . . has not expired." (Emphasis added.) We also note that the contract between the parties, which authorizes the parties

to institute arbitration proceedings in the event of a dispute, arises from a transaction involving commerce. Thus, we determine that the arbitration act applies to the present matter. We now turn to an examination of relevant federal precedent.

Federal courts consistently have acknowledged that "[a]s a general rule, once an arbitration panel renders a decision regarding the issues submitted, it becomes functus officio[9] and lacks any power to reexamine that decision."[10] *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 331 (3d Cir.1991); accord *Legion Ins. Co. v. VCW, Inc.*, 198 F.3d 718, 719 (8th Cir.1999) ("[t]he doctrine of functus officio prevents arbitrators from revisiting a final award after the final award has been issued"); *Hyle v. Doctor's Associates, Inc.*, 198 F.3d 368, 370 (2d Cir.1999). Courts also have recognized, however, that the doctrine has limitations and contains three exceptions that

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[9] "Functus officio" has been defined as "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force of authority." (Internal quotation marks omitted.) *Sterling China Co. v. Glass Workers Local No. 24*, 357 F.3d 546, 553 (6th Cir.2004), quoting *Green v. Ameritech Corp.*, 200 F.3d 967, 976 (6th Cir.2000). As one court has observed: "The policy which lies behind this [doctrine] is an unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." (Internal quotation marks omitted.) *Green v. Ameritech Corp.*, supra, at 976-77, quoting *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 572 (3d Cir.1967).

[10] We note that "[d]espite certain distinctions between common law and statutory arbitrations ... the functus officio doctrine has been routinely applied in federal cases brought pursuant to the [arbitration act], 9 U.S.C. § 1 et seq." (Citation omitted.) *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, 943 F.2d 327, 331 (3d Cir.1991).

allow an arbitrator's review of a final award.[11] *Sterling China Co. v. Glass Workers Local No. 24,* 357 F.3d 546, 554 (6th Cir.2004); accord *Green v. Ameritech Corp.,* 200 F.3d 967, 977 (6th Cir.2000); *Office & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital,* 186 F.3d 326, 331 (3d Cir.1999); *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.,* 109 F.3d 1409, 1411 (9th Cir.1997). The three exceptions to the rule of functus officio include: "(1) [where] an arbitrator can correct a mistake which is apparent on the face of his award"; (internal quotation marks omitted) *Office & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital,* supra, at 331; such as "clerical mistakes or obvious errors in arithmetic computation"; *Colonial Penn Ins. Co. v. Omaha Indemnity Co.,* supra, at 332; "(2) where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination; and (3) [w]here the award, although seemingly complete, leaves doubt whether the submission has been fully executed, an ambiguity arises which the arbitrator is entitled to clarify." (Internal quotation marks omitted.) *Office & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital,* supra, at 331.

With these exceptions in mind, federal precedent also informs us that a court may remand without vacating a case to an arbitrator for clarification of a final award,

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[11] The doctrine of functus officio serves as a default rule, and it applies only in the absence of an agreement between the parties to the contrary. *Hyle v. Doctor's Associates, Inc.,* supra, 198 F.3d at 370.

pursuant to the arbitration act. "It is generally recognized that there are circumstances, albeit limited, under which a district court can remand a case to the arbitrators for clarification." *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, supra, 943 F.2d at 333. "[M]any appellate courts have stated that an arbitration award under the [arbitration act] may be remanded for clarification if the award is ambiguous or incomplete"; *Lanier v. Old Republic Ins. Co.*, 936 F.Supp. 839, 845 (M.D.Ala.1996); and it is clear that "the functus officio doctrine does not preclude a motion for remand for clarification under the [arbitration act]." Id., at 848; see *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, supra, at 333-34 ("[a]lthough there is no explicit provision in the [arbitration act] for such a remand, courts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous"); see also *M & C Corp. v. Erwin Behr GmbH & Co.*, 326 F.3d 772, 782 (6th Cir.2003) ("'[a] remand is proper, both at common law and under the federal law of arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award'").

Moreover, we note that when a court remands an arbitration award for clarification, "[t]he resolution of such an ambiguity is not within the policy which forbids an arbitrator to redetermine an issue which he has already decided, for there is no opportunity for redetermination on the merits of what has already been decided." *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir.1967). On remand, "the arbitrator is limited in his review to the specific matter remanded for clarification and may not rehear and redetermine those matters not in question." *Paperhandlers Union No. 1,*

International Printing Pressmen & Assistants Union, AFL-CIO v. U.S. Trucking Corp., 441 F.Supp. 469, 474 (S.D.N.Y.1977). In such a circumstance, "the arbitrators will act only to remove the cloud of doubt . . . and will in no way reopen the merits of the controversy." *La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, supra, at 573. Thus, "[b]ecause of the limited purpose of such a remand, which serves the practical need for the . . . court to ascertain the intention of the arbitrators so that the award can be enforced, there is not even a theoretical inconsistency with the functus officio doctrine." *Colonial Penn Ins. Co. v. Omaha Indemnity Co.*, supra, 943 F.2d at 334.[12]

Bearing in mind these principles, we believe that the rationale employed by the United States Court of Appeals for the Sixth Circuit in *Green v. Ameritech Corp.*, supra, 200 F.3d at 976-78, and the United States Court of Appeals for the Ninth Circuit in *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, supra, 109 F.3d at 1411, are particularly instructive in the matter before us. In *Green*, the defendant employers challenged the judgment of the District Court, vacating an arbitration award in favor of the defendants and remanding the case to a new arbitrator. *Green v. Ameritech Corp.*, supra, at

[12] Although courts have recognized that "remand for clarification is a disfavored procedure . . . [w]hen possible . . . a court should avoid remanding a decision to the arbitrator because of the interest in prompt and final arbitration." (Internal quotation marks omitted.) *Tri-State Business Machines v. Lanier Worldwide*, 221 F.3d 1015, 1017 (7th Cir.2000), quoting *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir.1989). "[I]f an award is unclear, it should be sent back to the arbitrator for clarification." (Internal quotation marks omitted.) *Tri-State Business Machines v. Lanier Worldwide*, supra, at 1017, quoting *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273, 279-80 (7th Cir.1992).

969. The underlying matter that led to arbitration involved a claim by the plaintiff, a former employee named Daniel Green, and other former employees,[13] that the defendants had engaged in race and age discrimination and retaliation in violation of state antidiscrimination laws.[14] Id. Prior to trial, the parties had agreed to submit the matter to arbitration, which proceeded pursuant to the following relevant terms of the arbitration agreement: "The arbitrator's award shall be accompanied by an opinion which explains the arbitrator's decision with respect to each theory advanced by each [p]laintiff and the arbitrator's calculation of the types of damages, if any, awarded to each [p]laintiff. . . . Any challenge to the award shall be made only for the reasons enumerated in section 10 of the [arbitration act] . . . 9 U.S.C. § 10. . . . This Agreement is made pursuant to and is governed by the [arbitration act], 9 U.S.C. § 1 et seq." (Internal quotation marks omitted.) Id., at 970.

In his decision in favor of the defendants, the arbitrator found that "[c]onsidering all the evidence, the [a]rbitrator finds that [the plaintiff] has not met his burden of proof that the decision to terminate his employment . . . constituted age discrimination in violation [of the] Elliott-Larsen Civil Rights Act." (Internal quotation marks omitted.) Id., at 971. The arbitrator employed identical language in determining that the plaintiff had

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[13] After the arbitration commenced, all of the former employees, except Green, settled their claims. *Green v. Ameritech Corp.*, supra, 200 F.3d at 970.

[14] Although the case had originated in state court, the defendants removed the case to federal court. *Green v. Ameritech Corp.*, supra, 200 F.3d at 970.

failed to meet his burden of proof with respect to his race discrimination claim. Id. In resolving the retaliation allegation, the arbitrator found that "[c]onsidering all the evidence, the [a]rbitrator finds that [the plaintiff] has not met his burden of proving, in accordance with the standards set under the Elliott-Larsen Civil Rights Act, that retaliation for protected activity was a factor which made a difference in the decision to terminate his employment. . . . The [a]rbitrator finds no evidence to support the [p]laintiff's position that retaliation was, in any way, a factor in the [plaintiff's] termination." (Internal quotation marks omitted.) Id.

Thereafter, the plaintiff filed an appeal in the District Court, asking the court to vacate the award pursuant to the arbitration act, 9 U.S.C. § 10(a)(3) and (4). Id. Among his claims, the plaintiff contended that the arbitrator had violated the terms of the arbitration agreement by failing to explain the decision with respect to each of the plaintiff's theories. Id., at 972. Finding that the arbitrator had "exceeded his authority by failing to explain his decision," the District Court vacated the award and remanded it to a new arbitrator. Id. In its memorandum of decision, the District Court reasoned that "[h]ere, the arbitrator did not *explain* his decision with respect to each one of [the] plaintiff's theories, as the term explain is commonly understood. Rather, the arbitrator merely *announced* his decision with respect to each one of [the] plaintiff's theories. The arbitrator's opinion is totally conclusory and insufficient according to the terms of the Arbitration Agreement." (Emphasis in original; internal quotation marks omitted.) Id. The court rejected the defendants' suggestion that it should remand the case to the arbitrator

for clarification of his award, concluding that the award was not ambiguous. Id.

On appeal to the Sixth Circuit, the defendants claimed, among other things, that the District Court improperly had refused to remand the case to the arbitrator for supplementation and clarification instead of vacating the award. Id., at 976. In addressing this claim, the Court of Appeals noted that "[i]n its analysis, the district court misconstrued the governing law. The district court believed that remand to [the original arbitrator] was not an option; it stated that '[r]emand is available when an arbitration award is "ambiguous.'" . . . Finding that [the arbitrator's] award was not ambiguous, the district court concluded that it could not remand for an explanation. As both parties noted in their briefs, the district court must have based its conclusion that it lacked the authority to remand to the original arbitrator on the doctrine of functus officio." Id.

After explicating the functus officio doctrine, its underlying policies and three recognized exceptions, the Court of Appeals propounded that "'[a] remand is proper, both at common law and under the federal law of labor arbitration contracts, to clarify an ambiguous award or to require the arbitrator to address an issue submitted to him but not resolved by the award.'" Id., at 977, quoting *Industrial Mutual Assn., Inc. v. Amalgamated Workers, Local No. 383,* 725 F.2d 406, 412 n. 3 (6th Cir.1984). The court determined that "[i]n the instant case, the district court concluded, incorrectly in our view, that [the arbitrator] breached the arbitration agreement because he failed fully to execute his obligation to explain his award, and it refused to remand. Courts usually remand to the original arbitrator for clarification of an ambiguous award when

the award fails to address a contingency that later arises or when the award is susceptible to more than one interpretation. . . . While a failure fully to explain an award does not leave such an interpretive gap, we believe that it would nevertheless authorize a remand based on this third exception to the functus officio doctrine. *The purpose of this exception is to permit the arbitrator to complete an assigned task, and in this case the district court adjudged the arbitrator's task incompletely executed.*" (Citations omitted; emphasis added.) *Green v. Ameritech Corp.*, supra, 200 F.3d at 977. The Court of Appeals further determined that "[r]emanding to [the original arbitrator] under these circumstances would not implicate any of the concerns underlying the functus officio doctrine, as he would simply be completing his duties by clarifying his reasoning, not reopening the merits of the case." Id., at 977-78. Thus, even "if the district court were correct in its conclusion that [the arbitrator] failed to explain his award [within the terms of the arbitration agreement], *the proper remedy would have been a remand to the same arbitrator for clarification.*" (Emphasis added.) Id., at 978.

We find equally persuasive the Ninth Circuit's determination in *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, supra, 109 F.3d at 1410. In that case, the defendant employer, Silver State Disposal Service, Inc., appealed from the judgment of the District Court, which had confirmed an amended arbitration award and rendered summary judgment in favor of the plaintiff union. Id. The defendant had discharged a member of the union, and the union filed a grievance on his behalf, claiming that the defendant had failed to comply with the terms of the collective bargaining agreement. Id. The parties submitted the grievance to arbitration, and

the arbitrator determined that the defendant had discharged the employee without just cause. Id. The defendant reinstated the employee, but a dispute arose as to whether the arbitration award entitled the employee to receive back pay. Id. Over the defendant's objection, the union requested that the arbitrator clarify its decision. Id. In a letter to the parties, the arbitrator acknowledged that "my award was not clear in regard to the reinstatement of [the grievant]. . . . In my award, I intended for [the grievant] to receive back pay from the date of termination until the date of reinstatement except for the period of the three day suspension." Id. The union petitioned the District Court to confirm the award as amended, and the defendant filed a counterclaim, seeking enforcement of the initial award. Id. After both parties filed motions for summary judgment, the District Court confirmed the amended award and rendered summary judgment in favor of the union. Id.

On appeal to the Ninth Circuit, the defendant claimed that it was entitled to judgment as a matter of law because the arbitrator lacked the authority to clarify the award, pursuant to the rule of functus officio. Id. The court disagreed and determined that the doctrine of functus officio did not preclude the amendment because the arbitrator's initial decision had not been complete. Id. The court noted that it previously had recognized that "an arbitrator can . . . complete an arbitration if the award is not complete," and stated further that "[t]he completion exception to the doctrine of functus officio applies when an arbitration award fails to resolve an issue. . . ." (Internal quotation marks omitted.) Id., at 1411, quoting *McClatchy Newspapers v. Central Valley Typographical Union No. 46,* 686 F.2d 731, 734 n. 1 (9th Cir.1982). In the case before it,

the Court of Appeals concluded that "the arbitrator's clarification was permissible because it completed the award. The arbitrator explained that she had intended to award back pay, but had failed to address the issue." *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, supra, 109 F.3d at 1411. Moreover, the court noted that the defendant "offered no evidence to refute the arbitrator's explanation of her state of mind at the time she executed the initial award." Id. The Court of Appeals concluded, therefore, that "[t]he district court did not err in affirming the arbitrator's amended award because it is clear that the arbitrator's award was incomplete." Id., at 1412.

In the present case, as in *Green,* we believe that the trial court had the authority to remand the case pursuant to the arbitration act and federal precedent, without offending principles of functus officio. We also conclude, pursuant to *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, supra, 109 F.3d at 1410, that the arbitration panel may, on remand, complete what we believe constitutes an incomplete award.[15] As the trial

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[15] Hartford Steam Boiler claims that the Ninth Circuit's decision in *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir.1992), should control. We conclude, however, that *Green* and *International Brotherhood of Teamsters* are more persuasive. In distinguishing *Western Employers Ins. Co.*, wherein the Ninth Circuit vacated an arbitration award when the arbitrators had failed to include requisite findings of fact and conclusions of law, the *Green* court found significant that "the arbitration panel in *Western Employers [Ins. Co.]* actually *refused* to make the requisite findings and conclusions, instead questioning whether they were bound by the parties' agreement. . . . " (Emphasis in original.) *Green v. Ameritech Corp.* supra, 200 F.3d at 975. In the present matter, unlike in *Western Employers Ins. Co.*, there is no evidence of wilfulness on behalf of the arbitration panel to ignore or

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court found in the present matter, the arbitration panel's only task on remand is to clarify the factual basis for its allocation of the sums representing each party's liability; there is no question pertaining to Hartford Steam Boiler's and the underwriters' respective liability and the sums to be paid under the award because the arbitrators already have determined the dollar amounts representing the parties' respective liability. Because the "third exception to the functus officio doctrine . . . permit[s] the arbitrator to complete an assigned task"; *Green v. Ameritech Corp.*, supra, 200 F.3d at 977; we believe that this exception, as well as federal precedent permitting a court to direct a clarifying remand, enabled the trial court to order a rehearing for clarification purposes without vacating the award.[16]

We note, moreover, that our determination that the trial court had the authority to remand this matter to the panel is consistent with, and furthers, the federal and

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otherwise subvert the terms of arbitration agreement, and we therefore reject Hartford Steam Boiler's reliance on *Western Employers Ins. Co.*

[16] Hartford Steam Boiler claims that federal cases permitting the District Court to remand an award to the arbitrator are inapposite in the present matter because the cases do not "consider the temporal limitation on the court's authority to remand set out in 9 U.S.C. § 10(b)," which provides that "[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b) (formerly codified at 9 U.S.C. § 10[a][5]). We note that our determination that the trial court remanded but did not vacate the award renders inapplicable any time limitation contained in § 10(b). See *Hoffman v. Cargill, Inc.*, 59 F. Sup.2d 861, 874 n. 7 (N.D.Iowa 1999) (noting that 9 U.S.C. § 10[a][5], now codified at 9 U.S.C. § 10[b], "will become pertinent here only if this court vacates the arbitration award in question here"), rev'd on other grounds, 236 F.3d 458 (8th Cir.2001).

state policies favoring arbitration as a means for expedient resolution of disputes. *M & C Corp. v. Erwin Behr GmbH & Co.*, supra, 326 F.3d at 782; *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir.2002) ("[t]here is a strong federal policy favoring arbitration as an alternative means of dispute resolution"); *State v. New England Health Care Employees Union, District 1199, AFL-CIO*, 265 Conn. 771, 777, 830 A.2d 729 (2003) ("'[b]ecause we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution'"). "By its very purpose, arbitration is designed to result in a speedy and final resolution of controversies"; *Thompson v. Tega-Rand International*, 740 F.2d 762, 764 (9th Cir.1984) (per curiam); *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir.1980) ("[t]he purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes"); and, with this principle in mind, we are reluctant to erase the work surrounding this belabored arbitration proceeding, causing further delay, more time, and more resources to be expended, when a deficiency may be corrected by a simple clarification from the panel. Cf. *Iowa Mold Tooling Co. v. Teamsters Local Union No. 828*, 847 F.Supp. 125, 128 (S.D.Iowa 1993) ("[c]ourts are reluctant to reverse arbitration awards").

In addition, our conclusion likewise ensures that "private agreements to arbitrate are enforced according to their terms." (Internal quotation marks omitted.) *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103

L.Ed.2d 488 (1989). By allowing the arbitration panel to clarify its decision and to complete its assigned task, both Hartford Steam Boiler and the underwriters will receive an arbitration award in accordance with the terms agreed to in their governing procedures.

Having determined that the trial court had the authority to remand the case to the arbitration panel, we turn to the issue of whether Hartford Steam Boiler may appeal the remand order at this time. At the outset we note that "[t]he [arbitration act] has not been held to supersede state procedural laws"; (internal quotation marks omitted) *Hottle v. BDO Seidman, LLP,* supra, 268 Conn. at 697-98 n. 5, 846 A.2d 862, quoting *Hottle v. BDO Seidman, LLP,* 74 Conn.App. 271, 274 n. 4, 811 A.2d 745 (2002); and, therefore, we apply Connecticut law to determine whether we have jurisdiction to review the claims presented in this appeal. Hartford Steam Boiler claims that the judgment of the trial court was a final judgment for the purposes of appeal, pursuant to § 52-423 and *State v. Curcio,* supra, 191 Conn. 27, 463 A.2d 566.[17] We do not agree.

Our law relating to final judgments and interlocutory orders is well established. We previously have noted that "[t]he right of appeal is purely statutory. It is accorded only if the conditions fixed by statute and the rules of

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[17] We previously have applied both § 52-423 and the *Curcio* test in the context of arbitration appeals. See *Success Centers, Inc. v. Huntington Learning Centers, Inc.,* 223 Conn. 761, 766, 774, 613 A.2d 1320 (1992); *Daginella v. Foremost Ins. Co.,* 197 Conn. 26, 30, 495 A.2d 709 (1985); see also *Travelers Ins. Co. v. General Electric Co.,* 230 Conn. 106, 644 A.2d 346 (1994) (applying *Curcio* factors and holding that trial court's denial of stay pursuant to General Statutes § 52-409 was not appealable order).

court for taking and prosecuting the appeal are met." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* 262 Conn. 730, 733, 818 A.2d 731 (2003), quoting *State v. Curcio,* supra, 191 Conn. at 30-31, 463 A.2d 566. Moreover, "[t]he statutory right to appeal is limited to appeals by aggrieved parties from final judgments"; (internal quotation marks omitted) *Rivera v. Veterans Memorial Medical Center,* supra, at 733, 818 A.2d 731, quoting *State v. Curcio,* supra, at 30, 463 A.2d 566; and we have observed that "[l]imiting appeals to judgments that are final serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings." (Internal quotation marks omitted.) *Lisee v. Commission on Human Rights & Opportunities,* 258 Conn. 529, 541, 782 A.2d 670 (2001), quoting *Madigan v. Madigan,* 224 Conn. 749, 752-53, 620 A.2d 1276 (1993). "Because our jurisdiction over appeals . . . is prescribed by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* supra, at 733-34, 818 A.2d 731, quoting *State v. Curcio,* supra, at 30-31, 463 A.2d 566.

Hartford Steam Boiler's assertion that § 52-423 provides us with jurisdiction to review its claims is premised upon its argument that the trial court vacated the award. Because we have determined that the trial court did not vacate the award, or otherwise confirm, modify or correct it, the judgment does not constitute an appealable final judgment pursuant to the statute.

The failure of the judgment to fall within the terms of § 52-423, however, does not end our inquiry. "In both criminal and civil cases . . . we have determined certain

interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* supra, 262 Conn. at 734, 818 A.2d 731, quoting *State v. Curcio,* supra, 191 Conn. at 30-31, 463 A.2d 566. "The first prong of the *Curcio* test . . . requires that the order being appealed from be severable from the central cause of action so that the main action can proceed independent of the ancillary proceeding." (Internal quotation marks omitted.) *Burger & Burger, Inc. v. Murren,* 202 Conn. 660, 664, 522 A.2d 812 (1987), quoting *State v. Parker,* 194 Conn. 650, 654, 485 A.2d 139 (1984). "If the interlocutory ruling is merely a step along the road to final judgment then it does not satisfy" the first prong of *Curcio. State v. Parker,* supra, at 653, 485 A.2d 139. Similarly, "[a] judgment by a trial court ordering further administrative proceedings cannot meet the first prong of the *Curcio* test, because, whatever its merits, the trial court's order has not terminate[d] a separate and distinct proceeding." (Internal quotation marks omitted.) *Doe v. Connecticut Bar Examining Committee,* 263 Conn. 39, 46, 818 A.2d 14 2003), quoting *Schieffelin & Co. v. Dept. of Liquor Control,* 202 Conn. 405, 409-10, 521 A.2d 566 (1987).

The trial court's remand for a rehearing to clarify the panel's allocation award does not satisfy the first prong of the *Curcio* test. The very essence of the trial court's order seeking clarification of the award "so that the court will know exactly what it is being asked to enforce"; *Ottley v.*

Schwartzberg, 819 F.2d 373, 376 (2d Cir.1987); is indicative of the ongoing and unfinished nature of the process leading to a final judgment by the court.

Turning to the second prong of the *Curcio* test, we have recognized that it "focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* supra, 262 Conn. at 734, 818 A.2d 731. "An essential predicate to the applicability of this prong is the identification of jeopardy to [either] a statutory or constitutional right that the interlocutory appeal seeks to vindicate." (Internal quotation marks omitted.) *Cheryl Terry Enterprises, Ltd. v. Hartford,* 262 Conn. 240, 247, 811 A.2d 1272 (2002), quoting *Daginella v. Foremost Ins. Co.,* 197 Conn. 26, 31, 495 A.2d 709 (1985). "Unless the appeal is authorized under the *Curcio* criteria, absence of a final judgment is a jurisdictional defect that [necessarily] results in a dismissal of the appeal." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* supra, at 734, 818 A.2d 731, quoting *State v. Malcolm,* 257 Conn. 653, 667, 778 A.2d 134 (2001).

The trial court's remand similarly does not satisfy *Curcio*'s second prong because the order does not implicate any statutory or constitutional right. After the trial court's review of the arbitration panel's clarifying decision, wherein it will confirm, modify, vacate or correct the award, both Hartford Steam Boiler and the underwriters will be free to appeal any adverse final decision by the court.

With respect to the underwriters' cross appeal; see footnote 3 of this opinion; we note that the arbitrator did not, as the trial court found, fully comply with that portion of the submission requiring "findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award." Because we have determined that the trial did not confirm, vacate, correct or modify the award, pursuant to § 52-423, we lack jurisdiction to review this claim under the statute. Similarly, in applying the *Curcio* factors, we conclude that the trial court's order neither terminated a separate and distinct proceeding nor threatened the preservation of a right that "will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal." (Internal quotation marks omitted.) *Rivera v. Veterans Memorial Medical Center,* supra, 262 Conn. at 734, 818 A.2d 731. Accordingly, we are precluded from reviewing the underwriters' claim at this time.

Because we conclude that the trial court's order for a rehearing to clarify the arbitrators' allocation award does not constitute a final judgment, and does not satisfy either prong of the *Curcio* test, we lack subject matter jurisdiction to review the merits of this case.

The appeal is dismissed.

In this opinion the other justices concurred.

2002 WL 31001841 (Conn.Super.), 32 Conn. L. Rptr. 659

UNPUBLISHED OPINION

Superior Court of Connecticut.

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

v.

UNDERWRITERS AT LLOYD'S et al.

No. CV020814620S.

July 31, 2002.

RITTENBAND, JTR.

This case involves two claims. The plaintiff seeks to have the Court vacate an Arbitration Award and the defendants seek to confirm the award or in the alternative have the Court remand the case to the arbitrators for a rehearing and/or additional findings.

FACTS

The parties have agreed to a Stipulation of Facts dated on or about May 15, 2002 which Stipulation without exhibits is attached hereto and incorporated herein as Schedule A. In summary, however, the Court finds, in addition to the Stipulation of Facts, the following facts.

1. The plaintiff underwrote a policy of boiler and machinery insurance for Entergy Corporation and other named insureds to cover a coal-fired electrical generating facility located near Newark, Arkansas. Defendants underwrote a program of "all risks" property insurance for Entergy Corporation and other insureds.

2. On August 11, 1993, there was a catastrophic loss event at Independent Steam Electric Station Unit Two

("ISES Unit Two") which occurred at the facility located near Newark, Arkansas aforementioned. The owners of ISES Unit Two, Arkansas Power & Light Company and others promptly made claims against both the plaintiffs' and the defendants' policies, which claims were subsequently denied.

3. Plaintiff contended that the cause of the loss was an explosion of gas or unconsumed fuel, a peril excluded from its coverage and covered under the defendants' policy.

4. Defendants contended that the loss was the "breakdown of a fired vessel" excluded from the coverage provided by the defendants' insurance and that the event did not involve a combustion explosion that would otherwise render it (in whole or in part) a covered loss.

5. The insureds invoked parallel "Loss Adjustment Endorsements" found in the plaintiff's policy and the defendants' policy.

6. Pursuant to the policies plaintiff paid $10,933,435.86, and defendants paid $11,880,525.33. The difference is attributable to certain amounts that the parties agreed were within their respective coverages: $948,102.27 in costs that defendants admitted were covered by their policy and $1,012.80 in expenses that plaintiff admitted were its responsibility.

7. The coverage dispute between the plaintiff and defendants was then submitted to a panel of three arbitrators, namely Edwin W. Whitmore, Larry E. Gordon and Frank W. Ockerby as the third arbitrator and umpire.

8. The arbitration was conducted pursuant to the agreed March 1996 "Procedures to Govern the Arbitration."

9. The initial arbitration hearing was conducted in Memphis, Tennessee. The parties stipulated to an October 25, 1996 "Joint Statement of Issues."

10. On January 9, 1997 the Panel issued an interim Award on the factual questions set forth in the Joint Statement of Issues entitled "Decision of Arbitrators."

11. In response to questions by the parties as to the meaning of the Award, on September 22, 1997 the arbitrators issued a "Supplemental and Clarified Decision to the Answer of Issue iv of the January 9, 1997 Decision of Arbitrators."

12. As a result of the Panel's resolution of these questions the parties agreed that part of the loss fell within the coverage of the defendants and part of the loss fell within the coverage of the plaintiff.

13. The parties were unable to agree on the manner in which repair and restoration costs were to be allocated to each policy.

14. Plaintiff and defendants then resubmitted the matter to the Arbitration Panel for resolution subject to a July 19, 1999 stipulated "Statement of Issues and Procedural Time Line for Entergy Arbitration." The parties and arbitrators also agreed upon a set of "Revised Procedures to Govern the Phase II Arbitration Re: Allocation Issues."

15. This second phase of the arbitration hearing took place in Windsor Locks, Connecticut on June 28 and 29, 2001.

16. The Panel rendered an award entitled "Decision of Arbitrators" on January 24, 2002.

17. The award was in favor of the defendants, and on February 22, 2002 the plaintiff submitted an "Application to Vacate Arbitration Award." Defendants filed an "Application to Confirm the Arbitration Award, or, in the alternative, to refer to arbitrators for clarification."

18. A hearing was held on May 22, 2002 before this Court on the two applications even though the defendants' Application to Confirm Arbitration Award etc. does not appear to be in the file. However, it is addressed by both parties in the respective briefs and supplemental briefs the parties filed prior to May 22, 2002 and subsequent thereto.

STANDARD OF REVIEW

Plaintiff contends the arbitrators violated C.G.S. § 52-418(a)(4) in that " . . . the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

The determination of the issues before this Court has to be based upon the evidence submitted to it with the briefs of the parties. Further, it is plaintiff's burden to produce sufficient evidence to invalidate the award. Awards based upon consensual arbitration are subject to only minimal judicial intervention. See *Metropolitan District Commission v. AFSCME,* 37 Conn.App. 1 (1995). Every reasonable presumption and intendment must be indulged in favor of the award. *Cashman v. Sullivan & Donegan P.C.,* 23 Conn.App. 24 (1990). Unless the submission provides otherwise, an Arbitrator has authority to decide factual and legal questions, and courts will not review the evidence, or where the submission is unrestricted, the

Arbitrator's determination of legal questions. *O & G/ O'Connell Joint Venture v. Chase Family Limited Partnership,* 203 Conn. 133 (1987). "When the scope of the submission award is unrestricted, the resulting award is not subject to de novo review even for errors of law so strong as the award conforms to the submission." *SCRRA v. American Re-Fuel Co. of Southeastern Connecticut,* 44 Conn.Sup. 482, 484, 485 (1997), affirmed, 44 Conn.App. 728 (1997). "The authority of an arbitrator to adjudicate the controversy is limited only if the agreement contains express language restricting the breadth of the issues, reserving explicit rights, or conditioning the award on court review." *Id.* at 485.

ISSUES

1. Was there a waiver of the present claims of the plaintiff by the plaintiff?

"[C]ourts should 'indulge every reasonable presumption against waiver.'" *Parker v. Wingo,* 407 U.S. 514, 525 (1972). "Waiver presupposes a full knowledge of an existing right or a privilege *and something done designedly or knowingly to relinquish it*" either directly or by reasonable inference. (Emphasis added.) *Reinke v. Greenwich Hospital Assn.,* 175 Conn. 24, 27 (1978). Defendants have cited statements made by the plaintiff's counsel at the hearing of June 28, 2001 before the arbitrators. Attorney Stockman for the plaintiff stated on page 269 "The end point from the Panel is a statement that someone pays someone and how much they pay." The Court considers that an offhand remark which is not all inclusive and does not amount to a waiver of "an existing right *done designedly or knowingly to relinquish it*" either directly or by reasonable inference.

(Emphasis added.) Defendants also claim that the submission by the plaintiff to the Panel of its Decision Matrix is also a waiver by the plaintiff. This Court finds that the submission of said Matrix is not a waiver of an existing right or privilege and does not fit the category of "something done designedly or knowingly to relinquish it." *Reinke, supra.* There was no intent to relinquish any rights either directly or by inference. Therefore, the answer to the question posed above is "No." The plaintiff did not waive its present claims.

2. Did the Arbitrators' award(s) or decision(s) conform to the submission(s)?

The Court, after reviewing the transcript of the hearing before the Panel of June 28, 2001, Volume II, the transcript of the hearing before this Court on May 22, 2002, the submissions and briefs of the parties including exhibits and a review of the applicable law makes the following findings.

(a) The Federal Arbitration Act, 9 U.S.C. § 1 et seq. and the State Arbitration Act, Chapter 909 of the Connecticut General Statutes, specifically, C.G.S. § 52-418, both apply to this case. The language is essentially the same, and the criteria applied to the Application to Vacate is the same: " . . . if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

(b) All of the proceedings regarding the arbitration is one continuous arbitration. It contains different phases, but is all the same arbitration. There is no "former"

arbitration. The arbitration is in Phase I and Phase II.[1] The submissions to the arbitrators for both the January 9, 1997 Decision of Arbitrators and the Decision of the Arbitrators dated January 24, 2002 are the same. They both include the following language:

> The arbitration award shall be in writing and *shall contain findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award.* (Emphasis added).

See Exhibit C attached to the Stipulation of Facts and Exhibit H to the Stipulation of Facts. The Court interprets the aforementioned language which states in pertinent part: " . . . conclusions regarding the interpretation of the insurance policies . . ." to be the same as the requirement of "conclusions of law" as set forth in the case of *Western Employers Ins. v. Jefferies & Co., Inc. et al.,* 958 F.2d 258, 259 (9th Cir.1992). The interpretation of an insurance contract is the same as a legal conclusion of the applicability of an insurance policy. Courts interpret contracts which are insurance policies all the time, and that is considered an interpretation or a conclusion of law as to the policy. Therefore, the standard in the case at bar and in the *Western Employers Ins.* case, *supra,* are the same. The Court concludes that these submissions were not unrestricted submissions because the arbitrators were required to follow the aforementioned requirements. Counsel for

[1] The Stipulation of Facts includes both decisions and the events leading thereto.

both sides stated that nothing precludes the arbitrators from ruling on the law. TT page 8.[2]

(c) It has been stated both in the briefs and in the hearing of March 22, 2002 that the courts are not permitted to vacate an award because of an alleged error in contract interpretation. That may be true, but the claim here is not that there was error in contract interpretation. The claim here is that there was no contract interpretation at all.

(d) In the hearing of May 22, 2002 plaintiff claimed that on issues of fact and interpretation, the arbitrators should have been more specific, and the defendants believe that the requirement is in general and does not have to be as specific as the plaintiff claims.

(e) As of the First Joint Statement of Issues, Exhibit D to the Stipulation of Facts, four issues were presented, and in the Decision of Arbitrators, Exhibit E to the Stipulation of Facts, it is clear that the Panel voted no as to Issue 1, yes as to Issue 2 (both issues in No. 2), the finding on Issue 3 was (ii), and as to Issue 4 the issue was "Was the damage . . . caused by (i) one or more explosions of gasses or unconsumed fuel (as HSB argues); *or* (ii) overpressurization of the furnace enclosure due solely to the load imparted by steam flashing from ruptured tube ends (as the All-Risk Insurers argue)? The Panel found that both (i) *and* (ii) were the cause. It did not explain why this decision was reached or how the costs were to be apportioned." (Emphasis added.)

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[2] TT refers to the trial transcript of May 22, 2002.

(f) In the Supplemental and Clarified Decision of the Arbitrators to the answer of Issue No. 4 of the January 9, 1997 Decision of Arbitrators, Exhibit F to the Stipulation of Facts, the Panel expanded on its answer to the No. 4 Issue, but still did not apportion the liability between the parties and further stated that no evidence was presented to the Panel to quantify the damages caused by steam or by combustion explosion(s).

(g) The Court, therefore, finds that the facts as announced by the Panel are not as specific and as comprehensive as was required. Further, the Court finds that there was insufficient interpretation of the insurance policies. However, this Court cannot totally fault the arbitrators on this because the Joint Statement of Issues merely mentioned the various sections of the policies which would lead the Panel to merely say yes or no as to the sections of the policies. The parties themselves to some degree limited the findings by improperly limiting the questions.

(h) The problem of lack of specificity is more apparent in regard to the Decision of January 24, 2002, Exhibit K to Stipulation of Facts. In the Submission of Issues, Exhibit G to the Stipulation of Facts, the following language was also included: "B. The Panel must resolve all liability and allocation issues with respect to each category of costs identified in paragraph 1, including, without limitation, all coverage issues." Although the Panel in its Decision of Arbitrators dated January 24, 2002 recited the scope of the arbitration including the aforementioned paragraph B, there is no explanation or resolution of coverage issues. Further, there are no facts that support the figures in paragraphs a and b on the last page of the Decision of Arbitrators. There are no supporting facts or

allocation of liability or the reasons for the numbers that have been awarded as well as to which party liability should attach for each of these figures. Further in paragraph b there are neither supporting facts to adequately interpret the numbers assigned to Boiler & Machinery nor the numbers assigned to All-Risk. The findings are not sufficiently specific or comprehensive to comply with the requirement that all liability and allocation issues and all coverage issues be resolved, nor do the findings contain sufficient findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award.

REMEDY

The Court is reluctant to vacate the award because that would mean starting over again, and the parties would lose all the work, effort, etc. that covered six years of this arbitration. In the interest of economy of the parties, the Panel and judicial economy, it would appear that a remand to the arbitrators would be more practical and a better remedy than vacating the awards. However, the Court must have authority to do so. The plaintiff claims that there is no authority for a remand, and the defendants claim that there is. The pertinent part of the applicable statutes is: "If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators."

The Court finds that the final briefs were submitted on September 28, 2001 thereby setting a deadline (30 days) of October 28, 2001 for the award. On October 24, 2001 the Panel sought a delay in order to obtain advice

from a Certified Public Accountant. The parties agreed to a delay from October 24, 2001 until January 24, 2002. Therefore, the thirty-day period was tolled from October 24 to January 24 as aforesaid and, therefore, the final award was made within thirty days of October 28, 2001. Accordingly, the Court finds that the award was rendered within the thirty-day time limit. Plaintiff claims that the time for making the award has now expired because if the Court directs a rehearing or a remand to the arbitrators it would be doing so beyond the January 24, 2002 deadline. However, it would be impossible for the Court to direct a rehearing by the arbitrators before the time for the award has expired. If the award were made on the 28th day from submission of briefs, then the Court would have only two days in which to make a decision for a remand assuming that the application to vacate could be filed and presented to a judge within the thirty-day time limit. The law does not contemplate permitting something that is impossible to perform. In this particular case, because there was a tolling of the time period, it would still be impossible for the Court to even review an application to vacate and then order a remand because the time period expired as soon as the award was made on January 24, 2002. The time limit would have been October 28, 2001 if there had not been an agreed upon extension for tolling until the CPA gave his advice which occurred on the same day the award was made, January 24, 2002.

Accordingly, the Court finds that the time limit for making the award was fulfilled, but the time limit for the Court to act was and is an impossibility, and therefore, not applicable.

The Court hereby remands to the Arbitration Panel for a rehearing by the Panel and/or for a clarification of its

awards so that it complies with the requirements of the submissions and so that there be a sufficient finding of facts and interpretations of the policies so as to fully comply with the submissions. The parties are ordered, for the benefit of the Panel, to submit written interrogatories to the Panel so that if answered, the parties will be satisfied that there are sufficient findings of fact and interpretations of the policies. The parties are further ordered to submit to the Panel, for its benefit, proposed findings of facts and interpretations of policies. The interrogatories and proposed findings are to be submitted to the Panel within sixty days of the date of this decision or at any other date agreed upon by the parties. Upon the rehearing and submission of the interrogatories and proposed findings, the Panel is ordered to clarify its decisions as stated above within sixty days of the hearing or receipt of the interrogatories and proposed findings, whichever is later.

SCHEDULE A
STIPULATION OF FACTS

Plaintiff Hartford Steam Boiler Inspection and Insurance Company ("HSB") and Defendants Underwriters at Lloyd's and Companies Collective, National Union Fire Insurance Company, International Fire Insurance Company, Aetna Casualty and Surety Company, Home Insurance Company, and Zurich Insurance Company, stipulate as follows:

1. HSB underwrote policy number BMI-SA-9225738-13, a policy of boiler and machinery insurance, effective from May 1, 1991 through May 1, 1994, for Entergy Corporation and other named insureds (the "HSB Policy"). An accurate copy of relevant portions of the HSB Policy is attached as Exhibit A.

2. Defendants underwrote a program of "all risks" property insurance for Entergy Corporation (and other insureds), effective from June 1, 1993 to June 1, 1994 (the "All-Risks Insurance"). An accurate copy of relevant portions of Binder No. 2103, which the parties accepted as a true and accurate copy of the language of the All-Risks Insurance for purposes of the arbitration, is attached as Exhibit B.

3. On August 11, 1993, there was a catastrophic loss event at Independence Steam Electric Station Unit Two ("ISES Unit Two"), a coal-fired electrical generating facility located near Newark, Arkansas, causing in excess of $28 million in damage.

4. The owners of ISES Unit Two, Arkansas Power & Light Company and others, promptly made claims against both the HSB Policy and the All-Risks Insurance.

5. After investigating the loss, both HSB and Defendants denied coverage under their respective policies.

6. HSB contended that the cause of the loss was an explosion of gas or unconsumed fuel, a peril excluded from its coverage and covered under the All-Risks Insurance.

7. Defendants contended that the loss was the "breakdown of a fired vessel," excluded from the coverage provided by the All-Risks Insurance, and that the event did not involve a combustion explosion that would otherwise render it (in whole or in part) a covered loss.

8. When faced with these reciprocal denials, the insureds invoked parallel "Loss Adjustment Endorsements" found in both the HSB Policy and the All-Risks Insurance.

9. Pursuant to the endorsements, HSB paid $10,933,435.86 and Defendants paid $11,880,525.33. The difference is attributable to certain amounts that the parties agreed were within their respective coverages: $948,102.27 in costs that Defendants admitted were covered by the All-Risks Insurance, and $1,012.80 in expenses that HSB admitted were its responsibility.

10. Under the terms of the Loss Adjustment Endorsements, the coverage dispute between HSB and Defendants was submitted to a panel of three arbitrators.

11. Defendants appointed Edwin W. Whitmore to the panel. HSB appointed Larry E. Gordon. Messrs. Whitmore and Gordon jointly selected Frank W. Ockerby to serve as the third arbitrator and umpire.

12. The arbitration was conducted pursuant to the agreed March 1996 "Procedures to Govern the Arbitration," attached as Exhibit C.

13. The initial arbitration hearing was conducted in Memphis, Tennessee on October 21 through 25, 1996. This hearing focused on the causes and progress of the August 11, 1993 loss, and on certain factual questions relating to the application of certain policy language to certain technical design aspects of ISES Unit Two.

14. Pursuant to the request of the arbitrators, the parties stipulated to an October 25, 1996 "Joint Statement of Issues," attached as Exhibit D, to be addressed by the arbitrators in their Award.

15. On January 9, 1997; the arbitral panel issued an interim Award on the factual questions set forth in the Joint Statement of Issues, entitled "Decision of Arbitrators," attached as Exhibit E.

16. In response to questions by the parties as to the meaning of the Award, on September 22, 1997 the arbitrators issued a "Supplemental & Clarified Decision to the Answer of Issue IV of the January 9, 1997 Decision of Arbitrators," attached as Exhibit F.

17. As a result of the panel's resolution of these questions, the parties agreed that part of the loss fell within the coverage of the All-Risks Insurance, and part of the loss fell within the coverage of the HSB Policy.

18. The parties were unable to agree on the manner in which repair and restoration costs were to be allocated to each policy.

19. Accordingly, HSB and Defendants resubmitted the matter to the arbitral panel for resolution, subject to a July 1999 stipulated "Statement of Issues and Procedural Timeline for Entergy Arbitration," attached as Exhibit G.

20. In connection with this submission, in August 1999 the parties and arbitrators agreed upon a set of "Revised Procedures to Govern the Phase II Arbitration Re: Allocation Issues." An accurate copy of the "Revised Procedures to Govern the Phase II Arbitration Re: Allocation Issues" is attached to HSB's Application to Vacate Arbitration Award as Exhibit A, and is attached hereto as Exhibit H.

21. This second-phase arbitration hearing took place on June 28 and 29, 2001 in Windsor Locks, Connecticut.

22. Following the hearing, the parties submitted position statements advocating factual and legal positions. Accurate copies of the final position statements submitted by HSB and Defendants are attached as Exhibits I and J, respectively.

23. The panel rendered an award entitled "Decision of Arbitrators" on January 24, 2002, attached to HSB's Application to Vacate Arbitration Award as Exhibit B, and attached hereto as Exhibit K.

No. 04-916

IN THE

Supreme Court of the United States

HARTFORD STEAM BOILER INSPECTION AND INSURANCE COMPANY,

Petitioner,

v.

UNDERWRITERS AT LLOYD'S AND COMPANIES COLLECTIVE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Connecticut Supreme Court erred in holding, consistent with every other court that has considered the issue, that the doctrine of *functus officio* permits a remand of an arbitration award to the arbitration panel which rendered it, when the award is incomplete or unclear and, further, that the arbitration award in this case was incomplete and, therefore, susceptible to remand.

CORPORATE DISCLOSURE STATEMENT

Respondent Underwriters at Lloyd's and Companies Collective have no corporate parents, nor is 10% or more of their stock owned by a public company.

Respondent National Union Fire Insurance Company is a wholly-owned subsidiary of American International Group.

Respondent International Fire Insurance Company has no corporate parent, nor is 10% or more of its stock owned by a public company.

Respondent Aetna Casualty & Surety Company n/k/a Travelers Casualty Insurance Company of America has no corporate parent. The St. Paul Travelers Companies owns 10% or more of its stock.

Respondent Home Insurance Company has no corporate parent, nor is 10% or more of its stock owned by a public company.

Respondent Zurich Insurance Company is a wholly-owned subsidiary of Zurich Financial Service.

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STATEMENT OF THE CASE

The arbitration at issue arose out of a dispute as to the allocation of insurance coverage implicated by an August 1993 explosion at an Arkansas power generating plant. *Hartford Steam Boiler Insp. and Ins. Co. v. Underwriters at Lloyd's and Cos. Collective*, 857 A.2d 893 (Conn. 2004) (reproduced in Petitioner's Appendix (hereafter "Pet. App.") at 1-27). The parties to this action had each issued insurance policies to the owners of the plant. Pet. App. at 2. The petitioner, Hartford Steam Boiler Inspection and Insurance Company ("HSB") had issued a boiler and machinery policy, and the respondents, Underwriters at Lloyd's and Companies Collective, *et al.* ("Lloyd's"), had issued an "all-risks" property insurance policy. *Id.* After the loss, HSB contended that the cause of the loss was an explosion of gas or unconsumed fuel, a peril excluded from its coverage and covered under Lloyd's policy. *Id.* at 40. Lloyd's contended that the loss was the "breakdown of a fired vessel" excluded from the coverage provided by the "all-risks" policy, and that the event did not involve a combustion explosion that might otherwise render it a covered loss. *Id.*

The policies contained parallel "Loss Adjustment Endorsements" which provided that, in the event of a coverage dispute between the boiler and machinery carrier and the "all-risks" carrier, each would pay half of the amount in dispute and submit the matter to a panel of three arbitrators. Accordingly, HSB paid the insured $10,933,435.86 and Lloyd's paid the insured $11,880,525.33, and they each submitted their dispute as to allocation of coverage to a panel of three arbitrators. *Id.* at 2, 41.

The parties agreed to a "Joint Statement of Issues" to be decided by the Arbitrators. In January 1997, the Arbitrators issued an Interim Award on the factual questions set forth in the Statement of Issues. *Id.* at 3, 41-42. However, the parties believed that certain questions remained unanswered, so, at their request, the Arbitrators issued a "Supplemental and Clarified Decision to the Answer of Issue iv of the January 9, 1997 Decision of Arbitrators." *Id.*

While the Interim Award and Supplemental Decision clarified the application of policy language to the incident, they failed to specifically allocate repair and restoration costs between the policies. *Id.* Accordingly, the parties reopened the arbitration, returning to the Arbitrators again for further clarification. *Id.* at 3-4, 42. For the purposes of this resubmission, termed "Phase II Arbitration Re: Allocation Issues," the parties stipulated to a "Statement of Issues and Procedural Time Line for Entergy Arbitration." *Id.* The parties further agreed to "Revised Procedures to Govern Phase II Arbitration Re: Allocation Issues." *Id.*

On June 28, 2001, after six years of work and the two previous Arbitrators' decisions, the parties and the Arbitrators reconvened for the Phase II hearing. *Id.* at 4, 42. At the close of evidence on the final day of the hearing, the Arbitrators consulted with the parties regarding the form of the award to be rendered. At the conclusion of the parties' closing statements, Frank Ockerby, the arbitration panel umpire (apparently concerned with clarifying the Arbitrators' duties in properly adjudicating the matter), inquired of HSB's counsel what form the Arbitration Award should take. Counsel for HSB replied: "The end point from the Panel is a statement that someone pays someone and how much they pay." *Id.* at 5 n.4. The Arbitrators thereafter concluded the hearings.

On October 24, 2001, the panel requested more time within which to render its decision. The parties consented to the Arbitrators' request though no new deadline was established for the issuance of a decision. The parties also consented to the Arbitrators' request to retain the services of an accounting firm. *Id.* at 37-38.

On January 24, 2002, the Arbitrators rendered an award ("Award"). *Id.* at 4, 43. The Award specifically incorporated the issues to be determined as outlined by the parties in the scope of arbitration and, based on "cause of loss and policy conditions," assigned specific dollar amount attributable to each such issue. *Id.* Thereafter, HSB moved to vacate the Award on the ground that the Arbitrators had not complied with section 4(d) of the submission which indicated that the award should "contain facts and conclusions regarding the insurance policies . . . as necessary to support the award." *Id.* at 4. Lloyd's moved that the Award be confirmed or, in the alternative, referred back to the Arbitrators for clarification. *Id.*

Specifically, Lloyd's argued that the Award did, in fact, conform to the submission, thereby compelling confirmation of the same. Further, Lloyd's contended that HSB waived any right to receive findings of fact by representing on the record that it sought only "a statement that someone pays someone and how much they pay." *Id.* at 32-33. Alternatively, Lloyd's requested that the award be remanded to the panel. *Id.* at 37.

After briefing and oral argument, the superior court (Rittenband, J.) issued an order remanding the award. The

court compared the award to the submission and concluded that the Panel's

> findings are not sufficiently specific or comprehensive to comply with the requirement that all liability and allocation issues and coverage issues be resolved, nor do the findings contain sufficient findings of fact and conclusions regarding the interpretation of the insurance policies that are the subject of this arbitration as necessary to support the award.

Id. at 37. The court, however, noted its reluctance to vacate the award; instead opting to refer the award back to the Arbitrators for clarification

> because [vacating the award] would mean starting over again, and the parties would lose all the work, effort, etc. that covered six years of [the] arbitration. In the interest of economy of the parties, the Panel and judicial economy, it would appear that a remand to the arbitrators would be more practical and a better remedy than vacating the awards.

Id. The superior court ordered the award to be returned to "the Arbitration Panel for a rehearing and/or a clarification of its awards so that it complies with the requirements of the submissions and so that there be a sufficient finding of facts and interpretations of the policies so as to fully comply with the submissions." *Id.* at 38-39. Finally, the court held that HSB's representations on the record regarding the final form of the arbitration did not constitute waiver of its contractual right to receive these findings of facts. *Id.* at 33.

HSB thereafter appealed,[1] challenging the propriety of the order to remand the award where the thirty day time period for the Arbitrators' decision had expired. *Id.* at 5. Lloyd's cross-appealed seeking confirmation of the award on the ground that HSB had waived any objection to its form. *Id.* at 5 n.4. Additionally, Lloyd's argued that the superior court's order was not immediately appealable. *Id.* at 6. In October 2004, the Connecticut Supreme Court issued its decision, dismissing HSB's appeal on the ground that it was not taken from a final judgment.

The Supreme Court held that the judgment of the trial court directing rehearing by the arbitration panel to clarify its award constituted neither a final judgment nor an appealable interlocutory order. *Id.* at 1. Under Connecticut law, an appeal can be taken only from an order "confirming, vacating, modifying or correcting an award." Conn. Gen. Stat. § 52-423. Holding that the superior court's remand order was none of these, the Supreme Court held that it was without jurisdiction over HSB's appeal (and Lloyd's cross appeal). *Id.* at 27.

In so holding, the Supreme Court categorically rejected HSB's claim that the sole means by which a superior court could remand an arbitration award for a rehearing was via Connecticut General Statutes section 52-418(b),[2] which,

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1. The appeal was later transferred to the Connecticut Supreme Court on its own order. Pet. App. at 5.

2. Connecticut General Statutes section 52-418(b) provides:

> If an award is vacated and the time within which the award is required to be rendered has not expired, the
>
> (Cont'd)

HSB argued, was inapplicable because the thirty-day window for remand had closed. *Id.* at 5. The Supreme Court held that: first, section 52-418(b) was not implicated in this case because the superior court had not vacated the arbitration award, only remanded it; and, second, that the doctrine of *functus officio* provided sufficient authority for the remand. *Id.* at 11-21. Because the superior court acted within its power to remand the award for clarification, and the award had not yet been vacated, confirmed, or modified, the Supreme Court dismissed the appeal and cross appeal. *Id.* at 27.

REASONS FOR DENYING THE PETITION

I. HSB HAS NOT RAISED A FEDERAL QUESTION THAT INVOKES THE JURISDICTION OF THIS COURT

HSB's petition hinges on one critical and wrongly asserted premise: that the Connecticut Supreme Court has re-written, in an *ad hoc* manner, the provisions of the Federal Arbitration Act ("FAA") to permit the remand of a dispute to an arbitration panel, pursuant to 9 U.S.C. § 10(b),[3] even

(Cont'd)

> court or judge may direct a rehearing by the arbitrators. Notwithstanding the time within which the award is required to be rendered, if an award issued pursuant to a grievance taken under a collective bargaining agreement is vacated, the court or judge shall direct a rehearing unless either party affirmatively pleads and the court or judge determines that there is no issue in dispute.

3. Section 10(b) provides: "If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators."

though the time for rendering the award has expired. *See* Petition (hereafter "Pet.") at 11-12. In HSB's view, the Connecticut Supreme Court, following the lead of several federal circuits, improperly "affirmed an order remanding the award, without vacating it, and without regard to any temporal limitation upon the arbitrators' ability to act (as set forth in the arbitration agreement)." *Id.* at 15.

In its efforts to sound the "judicial lawmaking" alarm, HSB distorts the decision of the Connecticut Supreme Court. A balanced and fair reading of the Connecticut Supreme Court's decision reveals that the court neither explicitly nor implicitly construed the provisions of 9 U.S.C. § 10, or any other federal statute, for that matter. In fact, the Connecticut Supreme Court held that the trial court did not vacate the award and, therefore, 9 U.S.C. § 10 was inapplicable to the dispute; rather, the trial court simply found the award to be incomplete and remanded it back to the panel for clarification. Pet. App. at 9-10. This remand was in accordance with the principles of *functus officio*, a common law doctrine which is independently implied in every arbitration agreement unless an agreement provides otherwise. *Id.* at 11. Therefore, because the terms of 9 U.S.C. § 10 are not even implicated here, HSB has not met its burden of establishing that the Connecticut Supreme Court has decided a federal question that triggers the jurisdiction of this Court as set forth in 28 U.S.C. § 1257(a).

A. The Connecticut Supreme Court Did Not Base Its Decision on 9 U.S.C. § 10, But Rather On The Doctrine Of *Functus Officio*

In its petition, HSB vociferously argues that the Connecticut Supreme Court has violated this Court's mandate

to interpret federal statutes in accordance with their plain meaning. In this vein, HSB maintains that the Connecticut Supreme Court has engrafted a third statutory option onto 9 U.S.C. § 10, which allows for a remand of an award to the original arbitration panel "without regard to whether the arbitrators' appointment has expired under the parties' agreement." Pet. at 3.

Yet, remarkably, HSB has overlooked the plain fact that the Connecticut Supreme Court did not ground the trial court's authority to order a remand to the panel on any of the provisions contained in 9 U.S.C. § 10. Indeed, the Supreme Court specifically held that the trial court did not vacate the arbitration award. Pet. App. at 9-10. The only substantive analysis of 9 U.S.C. § 10 in the Supreme Court's decision appears in a footnote, wherein it held that the section was not applicable to the case at hand.

Specifically, the Court opined:

> [HSB] claims that federal cases permitting the District Court to remand an award to the arbitrator are inapposite in the present matter because the cases do not "consider the temporal limitation on the court's authority to remand set out in 9 U.S.C. 10 (b). . . ." ***We note that our determination that the trial court remanded but did not vacate the award renders inapplicable any time limitation contained in § 10 (b).*** *See Hoffmann v. Cargill, Inc.*, 59 F. Supp.2d 861, 874 n.7 (N.D. Iowa 1999) (noting that 9 U.S.C. 10 [a][5], now codified at 9 U.S.C. § 10 [b] "will become pertinent here only

> if this court vacates the arbitration award in question here"), *rev'd on other grounds*, 236 F.3d 458 (8th Cir. 2001).

Pet. App. at 21, n.16 (emphasis added). Thus, until such time as the award is vacated, 9 U.S.C. § 10 is simply inapplicable.

Additionally, as HSB acknowledges, the Connecticut Supreme Court, quoting a Third Circuit decision, freely admitted that "there is no explicit provision in the [arbitration act] [permitting] such a remand." Pet. App. at 13 (quoting *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 333-34 (3d Cir. 1991)).

Nevertheless, HSB persists with its argument that the Connecticut Supreme Court and at least three other circuit courts of appeals have failed to reference section 10(b) in cases involving a remand to the original arbitrators. Pet. at 21 (citing *Office & Prof'l Employees Int'l Union, Local 471 v. Brownville Gen. Hosp.*, 186 F.3d 326 (3d Cir. 1999); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24*, 357 F.3d 546 (6th Cir. 2004); *M & C Corp. v. Edwin Behr GMBH & Co.*, 326 F.3d 772 (6th Cir. 2003); *International Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409 (9th Cir. 1997)).

Notwithstanding these assertions, HSB ignores that the Connecticut Supreme Court upheld the trial court's authority to order a remand on a source that is independent of 9 U.S.C. § 10 (b); namely, the common law doctrine of *functus officio.*

B. The *Functus Officio* Doctrine Was Invoked Separately And Apart From 9 U.S.C. § 10 In Accordance With The Parties' Private Arbitration Agreement

The *functus officio* doctrine, which has its roots in the ancient common law, derives from the Latin meaning "having performed his or her office" and has been defined as "'having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force of authority.'" Pet. App. at 11 n.9 (quoting *Sterling China*, 357 F.3d at 553); *see also* BLACK'S LAW DICTIONARY 696 (8th Ed. 2004). The law implies the doctrine in all arbitration agreements unless an agreement provides otherwise.[4] *See, e.g.*, Pet. App. at 12, n.11 ("[t]he doctrine of functus officio serves as a default rule, and it applies only in the absence of an agreement between the parties to the contrary"); *see also Hyle v. Doctor's Assocs. Inc.*, 198 F.3d 368, 370 (2d Cir. 1999); *Trade & Transport, Inc. v. Natural Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991); *Colonial Penn*, 943 F.2d at 333; *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 848

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4. This proposition is consistent with *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), where this Court held that

> [a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.

Id. at 479 (citation omitted).

(7th Cir. 1995). The policy underlying the doctrine is an "unwillingness to permit one who is not a judicial officer and who acts informally and sporadically, to re-examine a final decision which he has already rendered, because of the potential evil of outside communication and unilateral influence which might affect a new conclusion." *Colonial Penn*, 943 F.2d at 331-32 (internal quotation marks omitted).

In the arbitration context, the doctrine of *functus officio* had been historically applied to arbitrations governed by the common law. *See, e.g., La Vale Plaza, Inc. v. Noonan, Inc.*, 378 F.2d 569 (3d Cir. 1967) (applying Pennsylvania common law). Importantly, for purposes of this case, courts that applied this doctrine to common law arbitrations developed certain exceptions to this prohibitory rule. These exceptions, which have been most notably expounded by the Third Circuit in *La Vale Plaza*, 378 F.2d at 569, provide that:

> (1) an arbitrator "can correct a mistake which is apparent on the face of his award";
>
> (2) "where the award does not adjudicate an issue which has been submitted, then as to such issue the arbitrator has not exhausted his function and it remains open to him for subsequent determination";
>
> (3) "[w]here the award, ***although seemingly complete***, leaves doubt whether the submission has been fully executed, ***an ambiguity arises which the arbitrator is entitled to clarify.***"

Id. at 573 (emphasis added).

The third exception, which the Connecticut Supreme Court applied in the case at hand, allows a court to remand an incomplete or unclear arbitration award to the original panel for the *sole* purpose of clarification. As *La Vale Plaza* made clear, "[t]he resolution of such an ambiguity is not within the policy which forbids an arbitrator to redetermine an issue which he has already decided, for there is *no opportunity for redetermination on the merits of what has already been decided.*" *Id.* (emphasis added).[5]

While the *functus officio* doctrine and its exceptions were historically applied to common law arbitrations, federal courts have also relied on the doctrine in arbitrations governed by federal arbitration statutes, including the FAA. *See, e.g.*, Pet. App. at 11, n.10; *Ottley v. Schwartzberg*, 819 F.2d 373, 375-77 (2d Cir. 1987); *Office & Prof'l Employees*, 186 F.3d at 331-32; *Colonial Penn*, 943 F.2d at 331; *Green v. Ameritech Corp.*, 200 F.3d 967, 977 (6th Cir. 2000); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir. 1968); *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845 n.11 (M.D. Ala. 1996) (citing cases).

In its petition, HSB has attacked the Connecticut Supreme Court's decision (and the federal precedent on which it relies) by asserting that these cases simply have engrafted a non-statutory remedy onto 9 U.S.C. § 10(b). In so arguing, HSB overlooks two critical points. First, the Connecticut Supreme Court explicitly held that section 10(b) was *not* implicated in this case because the award was not vacated. Pet. App. at 9-10; *see also Galt*, 397 F.2d at 442. Second, and most importantly, the Connecticut Supreme

5. The Connecticut Supreme Court specified that the substance of the award could not be revisited, only the missing information could be supplied. Pet. App. at 20-21.

Court did not need to "engraft" the *functus officio* doctrine onto section 10(b); application of the doctrine is a contractual matter because it is implied in *every* arbitration agreement unless provided otherwise. *See, e.g.*, Pet. App. at 12, n.11; *Hyle*, 198 F.3d at 370; *Trade & Transport, Inc.*, 931 F.2d at 195; *Colonial Penn*, 943 F.2d at 333; *Glass, Molders, Pottery, Plastics & Allied Workers*, 56 F.3d at 848.[6]

As a result, in accordance with this Court's long-standing mandate that private parties may set the rules of their arbitrations, the Connecticut Supreme Court properly enforced the independent authority granted to it vis-à-vis the parties' private arbitration agreement. Pet. App. at 4; *see also Volt*, 489 U.S. at 478 ("[the FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

Accordingly, in the case at the hand, the Connecticut Supreme Court, relying on federal precedent, concluded that

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6. Indeed, HSB appears to agree with this proposition as it noted in its petition that:

> It is an equally elementary principle of law that the parties' contract terms are deemed to incorporate existing principles of law: "it is presumed that parties contract with knowledge of, or in reliance on, existing law; accordingly it is presumed that the parties had such law in contemplation when the contract was made." 17A C.J.S. *Contracts* § 348 (1999); *accord* 11 Samuel Williston & Richard A. Lord, A TREATISE ON THE LAW OF CONTRACTS § 30.19, at 351-52 (4th ed. 1999); 17A AM. JUR. 2D *Contracts* § 371 (2004).

Pet. at 22. Thus, HSB should have been aware that the *functus officio* doctrine was a part of the parties' agreement in this case.

the trial court had the power to remand an incomplete arbitration award back to the panel for purposes of "[clarifying] the factual basis for [the panel's] allocation of the sums representing each party's liability . . . [as] there is no question pertaining to [HSB's] and the underwriters' respective liability and the sums to be paid under the award. . . ." Pet. App. at 21. The Court explained its reasoning for allowing such a remand by noting:

> Because the "third exception to the functus officio doctrine . . . permit[s] the arbitrator to complete an assigned task"; *Green v. Ameritech Corp.*, [200 F.3d 967, 977 (6th Cir. 2000)]; *we believe that this exception, as well as federal precedent permitting a court to direct a clarifying remand,* enabled the trial court to order a rehearing for clarification purposes without vacating the award.

Pet. App. at 21 (emphasis added).

In relying on federal precedent and the parties' private agreement, the Connecticut Supreme Court did not decide a federal question worthy of this Court's review. Pursuant to 28 U.S.C. § 1257(a), which HSB asserts as its jurisdictional basis, this Court may review the Connecticut Supreme Court's decision *only* "where the validity of a . . . *statute of the United States is drawn in question.* . . ." 28 U.S.C. § 1257 (a) (emphasis added). The Connecticut Supreme Court neither interpreted nor purported to apply 9 U.S.C. § 10 to the case at hand. Rather, the court's foray into federal matters was merely tangential through its reference to federal precedent, which only provided the necessary guidance for the application of the *functus officio* doctrine to the private arbitration agreement entered into by the parties. As a result,

the authority to remand the award for clarification arose from the arbitration agreement itself, separate and apart from 9 U.S.C. § 10, thus not implicating this Court's federal question jurisdiction. The petition should be denied.

II. CONTRARY TO HSB'S ASSERTIONS, THERE IS NO INTER-CIRCUIT CONFLICT

In an effort to make its petition appear attractive, HSB boldly asserts that the Connecticut Supreme Court's decision "conflicts with a decision of the United States Court of Appeals for the Ninth Circuit, and reflects general disarray in the decisions of the federal courts of appeals and federal district courts law." Pet. at 18. In actuality, however, HSB's purported "conflict" is nothing more than smoke and mirrors. The Ninth Circuit and countless other federal courts have all ruled in a manner consistent with the decision of the Connecticut Supreme Court. Simply stated, there is no conflict for this Court to resolve.

A. The Ninth Circuit's Holding in *Western Employers* Is Not Applicable

HSB's "conflict" argument rests exclusively on one Ninth Circuit case, *Western Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258 (9th Cir. 1992). In *Western Employers*, the parties, who were involved in an investment relationship, executed a "Limited Trading Authorization," which included a standard agreement to arbitrate any disputes under the rules of the National Association of Securities Dealers (NASD). *Id.* at 259. Additionally, upon Western's request, the parties agreed to alter the standard agreement so as to require the arbitrators to make certain findings of fact and conclusions of law. *Id.*

Throughout the subsequent arbitration proceedings, Western's counsel reminded the arbitrators about the parties' agreement, which required the panel to make such findings. In response, "[t]he Chairmen of the panel responded that the panel *was not bound* by an agreement between [the parties]." *Id.* at 260 (emphasis added.) Additionally, the panel also indicated that it agreed with a representation made by defense counsel that the NASD rules may not have permitted the parties to enter into a contract that would be binding on the arbitrators. *Id.* Therefore, the panel expressly refused to make such findings of fact and law. *Id.*

In light of the panel's express refusal to make such findings, which clearly contravened the parties' agreement, the Ninth Circuit vacated the panel's award, concluding that "the NASD panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement. In so doing, the panel exceeded its authority under 9 U.S.C. § 10(d) [currently § 10(a)(4)]." *Id.* at 262. Notably, the Ninth Circuit never mentioned the doctrine of *functus officio* or its exceptions, but rather vacated the award in accordance with the express terms of 9 U.S.C. § 10(a)(4). The omission of any discussion relating to the *functus officio* doctrine may be easily explained, however, as it appears that the parties did not argue that the doctrine was relevant, perhaps because there was simply nothing for the panel to clarify.

HSB maintains that *Western Employers* is indistinguishable from this case and, therefore, is controlling. Curiously, however, HSB has omitted any substantive discussion in its petition of another Ninth Circuit case, *International Bhd. of Teamsters v. Silver State Disposal Serv., Inc.*, 109 F.3d 1409 (9th Cir. 1997), which was decided five

years *after Western Employers*.[7] Indeed, this omission is particularly surprising given the Connecticut Supreme Court's express reliance on *International Brotherhood* in its decision. Pet. App. at 18-21 & n.15.

In *International Brotherhood*, a union and an employer participated in arbitration proceedings related to a grievance filed after the employer terminated one of the union's members. 109 F.3d at 1410. The arbitrator determined that the employee had been terminated without just cause and thereby reinstated the employee. *Id.* Subsequently, a dispute arose over whether the arbitration award entitled the employee to receive back pay. Over the defendant's objection, the union requested that the arbitrator clarify her award. In response, she acknowledged, "[M]y award was not clear in regard to the reinstatement for [the grievant]. . . . In my award, I intended for [the grievant] to receive back pay. . . ." *Id.*

On appeal, the employer claimed that the arbitrator lacked authority to clarify her award pursuant to the doctrine of *functus officio*. The Ninth Circuit disagreed, noting that it had previously adopted the three exceptions articulated in *La Vale Plaza*, 378 F.2d at 573, which allowed "an arbitrator [the opportunity to] correct a mistake which is apparent on

7. Although citing to *International Brotherhood* in two string cites in its petition, Pet. at 15, 21, HSB never acknowledges that it is a Ninth Circuit decision applying the *functus officio* doctrine, instead creating an impression that *Western Employers* represents the totality of Ninth Circuit law on the issue. Rather than confronting *International Brotherhood* head-on, HSB attempts to hide it, in one place even prefacing a string cite by saying that cases "principally from the Third and Sixth Circuits" have applied the *functus officio* doctrine – and then listing three cases each from the Third and Sixth Circuits – but tucked neatly between them is a cite to the Ninth Circuit's decision in *International Brotherhood*.

the face of his award, *complete an arbitration if the award is not complete*, and clarify an ambiguity in the award." *Id.* at 1411 (emphasis added). Importantly, the Ninth Circuit did not mention its holding in *Western Employers* or indicate in any way that it was relevant to the matter at hand. Accordingly, the Ninth Circuit concluded that "the arbitrator's clarification was permissible because it completed the award." *Id.*

In reaching its decision, the Ninth Circuit emphasized that the arbitrator's state of mind as to why back pay was not awarded was relevant to the proceedings. Specifically, the court noted that the arbitrator had indicated that she intended to make such an award, but failed to do so, and that the employer had "offered *no* evidence to refute the arbitrator's explanation of her state of mind at the time she executed the initial award." *Id.* (emphasis added).[8] Here, the Connecticut Supreme Court concluded that the arbitrators' states of mind were similarly relevant, pointing out that HSB had not presented any "evidence of wilfulness on behalf of the arbitration panel to ignore or otherwise subvert the terms of [the] arbitration agreement."[9] Pet. App. at 20-21 n.15 (relying on *International Brotherhood*).

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8. In its petition to this court, HSB argues for the *first time* that the arbitrators' states of mind are irrelevant, noting that "nothing in the text of the FAA conditions the remedy for a defective award on whether the defect was the result of intentional misconduct or inadvertent mistake." Pet. at 19-20. HSB has overlooked, however, that both the Ninth Circuit and the Connecticut Supreme Court remanded matters for clarification not on the express provisions of the FAA, but on the doctrine of *functus officio*, which was part of the parties' private agreements.

9. Indeed, Lloyd's claims that HSB waived the contractual provision requiring findings of fact and conclusions of law as a result

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Therefore, contrary to HSB's assertions, the law in the Ninth Circuit, as articulated in *International Brotherhood*, is that absent a showing of an arbitrator's *express* refusal to make such findings, a remand for clarification is appropriate. As a result, any purported "intra-circuit" conflict that may have arguably existed prior to *International Brotherhood* has since been resolved in a manner that is completely consistent with the Connecticut Supreme Court's decision in this case.

B. Other Federal Courts That Have Addressed This Question Have Arrived At The Same Conclusion As The Connecticut Supreme Court

Alternatively, HSB's "broader" argument is that there is "general disarray" in the federal courts regarding the practice of remanding arbitration awards to the original panel for clarification. While acknowledging that a number of courts have agreed with the Connecticut Supreme Court's decision, HSB suggests that these cases were wrongly decided and that only a small number of cases have been "faithful" to the dictates of 9 U.S.C. § 10(b). Pet. at 20. For the latter proposition, HSB cites two cases, both of which are easily distinguishable.

Remarkably, the first case HSB cites is *entirely consistent* with the Connecticut Supreme Court's decision. *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439 (7th Cir. 1968). In *Galt*, a contractor and subcontractor embroiled in a commercial dispute submitted the dispute to arbitration

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(Cont'd)

of statements made during the arbitration. *See supra.* Perhaps as a result of HSB's comments, the Arbitrators thought they were no longer being asked to supply findings of facts; this claim is the subject of Lloyd's cross-appeal, which has yet to be resolved. Pet. App. at 27.

pursuant to the terms of the subcontract. After an initial award was made, the subcontractor filed a motion to confirm the award. *Id.* at 441. In response, the contractor filed a motion seeking remand to the original arbitrators in order to determine whether they considered a "payment clause" contained in the subcontract, which the contractor had asserted as a defense, but was not addressed by the panel. *Id.* Concluding that "it was uncertain whether the arbitrators had considered whether the payment clause was subject to arbitration," the district court remanded the matter to the original panel. *Id.* at 441-42.

On appeal, the Seventh Circuit affirmed the district court's decision, expressly concluding (as the Connecticut Supreme Court did in this case), that 9 U.S.C. § 10 did *not* apply. Specifically, the court noted:

> Section 10 of [the FAA] empowers district courts to vacate awards and direct rehearings by the arbitrators where a mutual, final, and definite award was not made if the time for rendering the award had not expired. ***Because the award did not mention the payment clause***, even though that was one of the defenses presented to the arbitrators by [the contractor], ***the award was not definite within the meaning of Section 10 (d) [currently § 10 (a) (4)] of the Act***. . . . It was entirely appropriate for the District Court to let the arbitrators explain whether they had interpreted the payment clause. This method commendably avoided any judicial guessing as to the meaning of the award. *See La Vale Plaza, Inc. v. R.S. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967). It did not constitute a judicial invasion of the

> arbitrators' province but rather served to give the parties what they bargained for – a clear decision from the arbitrators.

Id. at 442 (emphasis added). Thus, since the award omitted any discussion of one of the contractor's defenses, it was not definite or complete within the meaning of 9 U.S.C. § 10 and, therefore, could be remanded to the panel for clarification. Similarly, in this case, the Connecticut Supreme Court also determined that 9 U.S.C. § 10 was inapplicable because the arbitration award was incomplete. Therefore, HSB's reliance on *Galt* is not only curious but completely contradicts any assertion that the federal case law is in a state of disarray.

Similarly, HSB's reliance on *Hoffman v. Cargill, Inc.*, 59 F. Supp. 2d 861 (N.D. Iowa 1999), *rev'd on other grounds*, 236 F.3d 458 (8th Cir. 2001), is misplaced. In *Hoffman*, the district court *vacated* an arbitration award based on two "extra-statutory" grounds not explicitly mentioned in 9 U.S.C. § 10: (1) the award was "completely irrational" because it was based on fundamental errors and unfounded determinations of law and fact; and (2) the proceedings in general were "fundamentally unfair." *Id.* at 895-96.[10] After vacating the award, the district court declined to direct a rehearing in accordance with 9 U.S.C. 10 (a) (5) [currently § 10(b)] because the time for making such an award had passed. *Id.* at 896.

While HSB seeks shelter within the court's holding, it has overlooked that the *Hoffman* court explicitly noted that

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10. The Eighth Circuit subsequently reversed these findings and ordered that the award be confirmed. *Hoffman*, 236 F.3d at 461-63.

the temporal limitations contained in section 10 (b) "will become pertinent here *only if this court vacates* the arbitration award in question here." *Id.* at 874 n.7 (emphasis added). As noted previously, the Connecticut Supreme Court held that section 10 (b) was inapplicable for this very reason, as the trial court did not *vacate* the arbitration award. Pet. App. at 9-10.[11] Therefore, *Hoffman* is irrelevant to the case at hand.

As a result, HSB has not provided this Court with any authority for the proposition that there is "general disarray" in the federal courts regarding the practice of remanding an arbitration award under the *functus officio* doctrine. Rather, it has been universally held by federal courts that such a remand *is* appropriate. *See, e.g., Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987); *Office & Prof'l Employees Int'l Union, Local 471 v. Brownville Gen. Hosp.*, 186 F.3d 326, 331-32 (3d Cir. 1999); *Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 332-35 (3d Cir. 1991); *La Vale Plaza, Inc. v. Noonan, Inc.*, 378 F.2d 569, 573 (3d Cir. 1967); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers, Local 24*, 357 F.3d 546, 553-55 (6th Cir. 2004); *M & C Corp. v. Edwin Behr GMBH & Co.*, 326 F.3d 772, 782-83 (6th Cir. 2003); *Green v. Ameritech Corp.*, 200 F.3d 967, 976-78 (6th Cir. 2000); *Tri-State Bus. Machs., Inc. v. Lanier Worldwide, Inc.*, 221 F.3d 1015, 1019 (7th Cir. 2000); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Excelsior Foundry Co.*, 56 F.3d 844, 846-848 (7th Cir. 1995); *Galt v. Libbey-Owens-Ford Glass Co.*, 397 F.2d 439, 442 (7th Cir. 1968); *Domino Group, Inc. v. Charlie Parker Mem'l Found.*, 985 F.2d 417, 420 (8th Cir. 1993);

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11. Again, the entire basis for the Connecticut Supreme Court decision was that there was no final judgment because the award was not vacated. Pet. App. at 27.

International Bhd. of Teamsters v. Silver State Disposal Serv., Inc., 109 F.3d 1409, 1411-12 (9th Cir. 1997); *Kennecott Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1270-71 (10th Cir. 1999); *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845-46 & n.11 (M.D. Ala. 1996). In light of this breadth of authority, it is clear that the federal courts have been remarkably unified in their resolution of this issue. There is no cause for this Court to grant the extraordinary remedy of certiorari.

III. THE REMAND OF AN INCOMPLETE ARBITRATION AWARD TO THE ORIGINAL PANEL FOR THE SOLE PURPOSE OF CLARIFICATION ADVANCES THE GOALS OF COMMERCIAL ARBITRATION

It is well established that judicial review of an arbitration award must take into consideration and weigh two competing policy goals. The first of these considerations is that the underlying goal of arbitration is to encourage the expedient and efficient resolution of commercial disputes. *Volt*, 489 U.S. at 478. Nonetheless, while arbitration is clearly favored, this Court has consistently held that "we must not . . . allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation;" namely, the "desire to enforce agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). By remanding an incomplete arbitration award for purposes of clarification, the Connecticut Supreme Court's decision fully comported with both of these policy considerations.

In its petition, HSB has presented a "parade of horribles" based on its unsupported notion that the Connecticut Supreme Court permitted a remand without regard to the temporal

limitations contained in 9 U.S.C. § 10(b). In HSB's view, the Connecticut Supreme Court was "improperly" motivated by a desire to effectuate federal and state policies that favor arbitration as a means for the expedient resolution of commercial disputes. Pet. at 24. As explained in Part II, however, the Connecticut Supreme Court created no such provision, but instead applied an exception to the doctrine of *functus officio*, which was an implied part of the parties' arbitration agreement. *See supra.*

As a result, contrary to HSB's allegations, the Connecticut Supreme Court faithfully followed this Court's mandate to enforce the terms of privately enforced agreements. Pet. App. at 22-23. Indeed, the practice of remanding arbitration awards for clarification inherently ensures the enforcement of the parties' agreement, as "[s]uch a remand avoids the court's misinterpretation of the award and is therefore *more likely to give the parties the award for which they bargained.*" *Colonial Penn*, 943 F.2d at 334 (emphasis added); Pet. App. at 23; *see also Galt*, 397 F.2d at 442 ("[remand] did not constitute a judicial invasion of the arbitrators' province but rather served to give the parties what they bargained for – a clear decision from the arbitrators").

Despite HSB's numerous unsuccessful attempts to interject claims of judicial lawmaking, purported conflicts, and disarray in the federal courts, the fact remains that the Connecticut Supreme Court's decision is consistent not only with a plethora of federal case law that spans the circuits, but also is consistent with the parties' private agreement.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

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In The Supreme Court of the United States

HARTFORD STEAM BOILER
INSPECTION AND INSURANCE COMPANY,

Petitioner,

v.

UNDERWRITERS AT LLOYD'S AND
COMPANIES COLLECTIVE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Connecticut

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

As petitioner Hartford Steam Boiler Inspection and Insurance Company ("HSB") has already shown in its Petition for Writ of Certiorari, the Connecticut Supreme Court's decision in this case has effectively created a new, unwritten addendum to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* sanctioning a remand to arbitrators for clarification that not only is absent from the statutory text, but that in fact is flatly inconsistent with the FAA's express terms. In so doing, the Connecticut court created a conflict between its decision and the decision of the United States Court of Appeals for the Ninth Circuit in *Western Employers Insurance Co. v. Jefferies & Co.*, 958 F.2d 258 (1992), and threatened the very predictability of result that commercial arbitration is intended to achieve. Accordingly, HSB has shown that this Court's intervention is needed, to give effect to unambiguous statutory language and to ensure that judicial review of arbitration awards proceeds under predictable and well-defined rules.

Respondents' Brief in Opposition does not undermine these showings. Even so, a brief reply is in order, to make clear (i) that this matter in fact does present a federal question within this Court's jurisdiction, and (ii) that this Court's review is needed to ensure that the FAA is interpreted in accordance with its express terms and consistently throughout the United States.[1]

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[1] Because of the constraints inherent in a reply, HSB's failure to take issue with each of the many misstatements of law in Respondents' Brief should not be construed as agreement with or acquiescence in those misstatements.

I. The Decision Below Implicates a Federal Question Within This Court's Jurisdiction.

The bulk of Respondents' effort in their Brief in Opposition is directed to suggesting that this case does not present a federal question within this Court's jurisdiction. Respondents' argument, however, is belied by the very language of the Connecticut Supreme Court's opinion, as well as the statute that confers jurisdiction to review that decision (a statute Respondents expediently quote only in part).

This Court, of course, has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State . . . where the validity of a . . . statute of the United States is drawn in question . . . or where any title, right, privilege or immunity is specially set up or claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a).

The decision of the Connecticut Supreme Court plainly qualifies. Indeed, the court ***explicitly*** grounded its decision, and the availability of remand, on the FAA and principles of federal law:

> In the present case . . . , we believe that ***the trial court had the authority to remand the case pursuant to the arbitration act and federal precedent,*** without offending principles of functus officio.

Appendix ("App.") 20 (emphasis added).[2] *See also* App. 11 ("Thus, we determine that the arbitration act applies to

[2] Earlier in its opinion, the court defined the term "arbitration act" to refer to the FAA. *See* App. 7 ("Federal Arbitration Act (arbitration act), 9 U.S.C. § 1 et seq.").

the present matter. We now turn to an examination of relevant federal precedent."); App. 12 ("federal precedent also informs us that a court may remand without vacating a case to an arbitrator for clarification of a final award, pursuant to the arbitration act"); App. 13 ("'[M]any appellate courts have stated that an arbitration award under the [arbitration act] may be remanded for clarification if the award is ambiguous or incomplete' and it is clear that 'the functus officio doctrine does not preclude a motion for remand for clarification under the [arbitration act].'" (brackets in original; quoting *Lanier v. Old Republic Ins. Co.*, 936 F. Supp. 839, 845, 848 (M.D. Ala. 1996)).

The fact that the court did not ground the right to remand in any specific provision of the FAA – but rather apparently found the ability to remand for clarification in some accompanying principle of federal common law or some indistinct "penumbra" of the FAA – does not make its decision any less a matter of federal law.

Moreover, even if it could be said that the court's decision was exclusively a matter of common law, rather than statutory construction, there nonetheless is jurisdiction because HSB's right ***not*** to proceed on remand before the original arbitral panel is a "right, privilege, or immunity . . . specially set up or claimed under the . . . statutes of . . . the United States." 28 U.S.C. § 1257(a).[3] After all, HSB believes that the exclusive source of authority for dealing with errant arbitral awards is 9 U.S.C. § 10, which by its plain terms authorizes a remand ***only*** after an award is first vacated, and ***only*** when the time for rendering an award has not passed. *See* 9 U.S.C. § 10(b). Conversely,

[3] Respondents fail to quote this portion of the jurisdictional grant.

then, HSB believes that the Connecticut courts' adoption of an implicit power to remand for clarification contravenes HSB's right, as a matter of federal statutory law, to have the arbitral award dealt with in the matter provided in 9 U.S.C. § 10.[4]

Finally, the decision below effectively "draws into question" the "validity" of a federal statute, 28 U.S.C. § 1257(a), by causing a *de facto* judicial repeal of 9 U.S.C. § 10(b). After all, if courts are able to freely substitute a "simple remand for clarification" for Section 10(b)'s more limited remedy, Section 10(b) lacks any independent effect.[5]

In short, regardless of the common law origins of any right to remand, there is no question but that the decision of the Connnecticut Supreme Court implicates the FAA, and thus falls squarely within this Court's jurisdiction. Respondents' contrary contention – that a decision that expressly relies on a federal statute somehow fails to implicate a federal question – simply defies common sense.

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[4] As this Court has instructed, and HSB has previously argued, " 'where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' " *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (quoting *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 19 (1979)). In such situations, we are "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

[5] As HSB has argued, this Court's decisions make clear that courts must, wherever possible, construe statutes to "give every word some operative effect," and that courts conversely should not read a statute in a manner that would render part of it "entirely superfluous." *Cooper Indus., Inc. v. Aviall Services, Inc.*, ___ U.S. ___, 125 S. Ct. 577, 583-84 (2004).

II. The Decision Below Squarely Conflicts With the Ninth Circuit's Decision in *Western Employers Insurance v. Jefferies & Co.*

Nor is there any substance to Respondents' efforts to distinguish this case from *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir. 1992), a case which also involved an arbitral panel's failure to provide findings of fact and conclusions of law, but in which the Court was faithful to the statutory text and vacated the award.

Respondents' argument merely parrots the Connecticut Supreme Court's: both focus, unpersuasively, on the fact that the arbitrators in *Western Employers* affirmatively refused to provide findings and conclusions, while the actual motive of the arbitrators here remains unknown. *See* Respondents' Brief in Opposition at 15-16; App. 20-21 n.15. As HSB has already argued, that is a distinction without a difference, lacking any grounding in the language of the FAA or the core policies under girding the FAA.

Respondents also suggest that any conflict is negated by the Ninth Circuit's subsequent holding in *International Brotherhood of Teamsters, Local 631 v. Silver State Disposal Service, Inc.*, 109 F.3d 1409 (9th Cir. 1997), which permitted a remand as a matter of federal common law. Respondents fail to recognize, however, that the *Teamsters v. Silver State* case involved a labor arbitration, and not a commercial arbitration governed by the FAA. That distinction is critical: in the former case, this Court has invited courts to develop a body of federal common law, under the authority of Sections 203(d) and 301(a) of the Labor Management Relations Act, 29 U.S.C. §§ 173(d), 185(a), to govern labor arbitrations. *See generally Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

Indeed, this Court has emphasized that "arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). And indeed, labor contracts are expressly excluded from the FAA's coverage. *See* 9 U.S.C. § 1 ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"). *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 832 (1996) (criticizing the unthinking transfer of concepts from labor arbitration under the LMRA to commercial arbitration under the FAA). In consequence, it cannot be said that the *Teamsters* case has any proper application in commercial arbitrations, such as those at issue here and in *Western Employers*.

Moreover, even if there were an intra-circuit conflict (which might not by itself justify this Court's review), that does not negate the existence of a simultaneous conflict between a state high court and a federal court of appeals (warranting this Court's resolution). As a result, even if there is a conflict between *Western Employers* and *Teamsters v. Silver State*, that does not negate the existence of a direct conflict between *Western Employers* and the decision below.

III. Recapitulation.

In sum, nothing in Respondents' submission undermines the core considerations warranting this Court's review:

- **First,** that the Connecticut Supreme Court's decision contravenes the express language of 9 U.S.C. § 10(b), which permits remand only if an award is first vacated, and only if the time in which the arbitrators are to act has not expired;
- **Second,** that the Connecticut Supreme Court's ruling conflicts directly with the Ninth Circuit's decision in *Western Employers*, making manifest a conflict in principle that has lingered for years; and
- **Third,** that the Connecticut Supreme Court's ruling, by permitting *ad hoc* remands without regard to the statutory text, undermines parties' ability to define in advance the circumstances under which an arbitration will proceed, in a way that compromises the very certainty that is a key benefit of the commercial arbitration process.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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